EXHIBIT "A"

To the Petition for Rehearing

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 507.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE UNCLE SAM OIL COMPANY.

Appeal from the United States Commerce Court.

Filed April 10, 1913.

SUPREME COURT OF THE UNITED STATES.

October Term, 1912.

No. 1054.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE UNCLE SAM OIL COMPANY.

Appeal from the United States Commerce Court.

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a

In the United States Commerce Court.

No. 76.

The Uncle Sam Oil Company, petitioner,
vs.
The United States of America, respondent; Interstate Commerce Commission, intervener.

United States of America, ss:

Be it remembered that in the United States Commerce Court, in the city of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for injunction.

(Filed July 23, 1912.)

1 In the United States Commerce Court.

Docket No. 76.

The Uncle Sam Oil Company, petitioner,
vs.
The United States of America, respondent.

Petition for injunction.

To the Judges of the United States Commerce Court:

The Uncle Sam Oil Company, as petitioner herein, for its petition against the respondent, the United States of America, complains, alleges, and avers:

1. That your petitioner, The Uncle Sam Oil Company, was duly and legally incorporated as a private corporation under the laws of the Territory of Arizona in February, 1905, for the purpose of producing crude petroleum, transporting it from its oil wells to its refineries, refining and marketing the same, and that ever since said incorporation your petitioner has been and now is a private mining and manufacturing corporation, existing under the laws of Arizona and doing a private business according to law.

2 2. That on the date of its said incorporation the law under which it was incorporated prohibited it from constructing or operating any railway, tramway, or other means for transporting persons or property for hire, and specifically provided that your petitioner should have no power to construct or operate any means for transporting persons or property except such as may lead from the principal works or place of business of your petitioner to some navigable stream, or to some existing railroad, turnpike, or public

highway, and that said law then became and now is a part of the charter of your petitioner, and thereby your petitioner has no power to engage in the business of transporting persons or property as a common carrier.

3. That immediately after the date of its incorporation as aforesaid, your petitioner erected, at large expense, one of its refineries for refining crude petroleum, near the city of Cherryvale, in the State of Kansas, and drilled in many oil wells on its leased land in the Osage Indian Reservation, in the State (then Territory) of Oklahoma; that it markets its refined products by establishing distributing stations in the trade centers most accessible to each of its refineries, at which stations it has erected large storage tanks and equipment, and has tank wagons to make delivery of the products which it ships to said stations by the carload; that it now has about eighty stations in Kansas, Oklahoma, and Missouri depending chiefly upon said refinery for their supply of refined oils; that it applied to the Atchison, Topeka and Santa Fe Railway Company, the only railway line extending from the oil wells of your petitioner to the said refinery of your petitioner, and demanded that said railway company should transport the oil from the wells to said refinery and at a fair and reasonable rate; that at said time your petitioner was producing, refining, and marketing its oil in competition with The Standard Oil Company, which company had its vice president and active manager, H. H. Rodgers, and other representatives upon the board of
3 directors of said railway company; that said railway company established a freight rate of 39 cents per barrel on crude petroleum, from the oil wells of your petitioner, near the city of Bartlesville, Oklahoma, to the refinery of your petitioner, near the city of Cherryvale, Kansas, a distance of approximately sixty miles, and provided that your petitioner should provide the tank cars in which such crude oil should be shipped; that the market price of crude oil at that time was only 35 cents per barrel, and the price of refined oil was such as to make said freight rate prohibitive: that it was excessive, unreasonable, and unjust; that your petitioner could not pay said rate and continue its competition with the Standard Oil Company with the products of said refinery; that to avoid such ruinous freight rate your petitioner was compelled to and did construct a three-inch pipe line, extending from near its oil wells and near the said city of Bartlesville, in the State of Oklahoma, to its refinery near the said city of Cherryvale, in the State of Kansas, and connected its said oil wells with said pipe line by smaller gathering lines in the oil field; that since in the year 1906 your petitioner has operated said pipe line, pumping its own oil from the wells in Oklahoma to its said refinery in Kansas, and supplied said distributing stations from said refinery, and maintained its competition with the Standard Oil Company, in spite of said freight rate.

4. That your petitioner, during all of the time since constructing said pipe line, has used the same for the sole and exclusive purpose

conducting or gathering its own oil from the wells to its refinery, and such use has been necessary; that your petitioner has never transported any oil for any other person, firm, or corporation; that your petitioner during all of said time has never been requested to transport any oil for others from Bartlesville to Cherryvale or vice versa; that the market price for crude oil has remained the same at Bartlesville as at Cherryvale, and there has been and now is no reason why any person, other than your petitioner, should desire to transport any crude oil from Bartlesville to Cherryvale or from Cherryvale to Bartlesville; that there is no refinery for refining crude oil at Cherryvale except said refinery of your petitioner, and it is supplied from the wells through said pipe line.

5. That your petitioner has at no time held itself out to the public as willing to carry oil for the public by means of said pipe line, nor that it was willing to assume the duties and obligations of a common carrier; that your petitioner has no power to engage in the business of a common carrier; that it has no facilities for receiving, storing, transporting, and delivering to another any oil that might be tendered for shipment; that the oil in that oil field is of different grades, quality, and value, and your petitioner has no means whereby it could receive, store, transport, and deliver to another the same oil that should be tendered for transportation; that under these conditions it is physically impossible for your petitioner to assume the duties and responsibilities of a common carrier to receive, store, transport, and deliver to the consignee or owner the same oil which may be tendered for shipment.

6. That the transaction whereby your petitioner produces the crude oil at the wells, gathers it from the wells, and pumps it to its refinery as above stated, is a transaction wholly within your petitioner; that there is no other person concerned with it and no element of commerce in it; that it is purely a private transaction, and does not come under the jurisdiction of the Interstate Commerce Commission; that there is no law giving said commission any right or authority to interfere with or molest your petitioner in the free use of its said pipe line in the conduct of its said private business; that your petitioner is the lawful owner of said pipe line, and has the right under the Constitution and laws of the United States to possess, use, and enjoy said pipe line free from the dominion, interference, or control of said Interstate Commerce Commission or any one else; that the right to refuse to surrender said pipe line to the public is property belonging to your petitioner and cannot be taken from your petitioner without due process of law.

7. That said pipe line is necessary to enable your petitioner to prosecute its business and maintain its competition with the Standard Oil Company; that the entire capacity of said pipe line is and will be constantly required to supply the refineries of your petitioner; that your petitioner anticipates that in the near future it will be necessary to enlarge the line to meet the requirements of your petitioner's

own private demands thereon, and that if your petitioner should be required to surrender to the public the use of said pipe line it would be compelled to close its said refinery at Cherryvale, Kansas, for lack of facilities to transport its own oil from its wells to its said refinery; that its private business would very injuriously be affected, and its ability to maintain its competition with the Standard Oil Company in the territory now supplied by said refinery would thereby be greatly diminished if not destroyed.

8. That heretofore the Interstate Commerce Commission, upon its own motion, instituted certain proceedings entitled "In the Matter of Pipe Lines, No. 4199," for the purpose of determining its jurisdiction over and concerning certain pipe lines in the United States, among which is the pipe line of The Uncle Sam Oil Company. Your petitioner and various other corporations and partnerships were made respondents, and on the 8th day of June, 1911, the Interstate Commerce Commission made a certain order in words and figures following, to wit:

6 Interstate Commerce Commission.

Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of June, A. D. 1911.

Present: Judson C. Clements, Charles A. Prouty, Franklin K. Lane; Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 4199.

In the Matter of Pipe Lines.

Complaint being made to this commission that the carriers hereinafter named, and each of them, have established certain rates, classifications, and regulations which were unjust, unreasonable, unjustly discriminatory, unduly preferential and prejudicial, and otherwise in violation of the provisions of the act to regulate commerce and acts amendatory thereof, and that the practices of said carriers, and each of them, in the conduct of business subject to said act are unjust, unreasonable, unjustly discriminatory, unduly preferential and prejudicial, and otherwise in violation of the provisions of said act, and good cause appearing therefor.

It is ordered, That an inquiry be, and the same is hereby, instituted in the above-mentioned matters by this commission on its own motion, and that the rates, classifications, regulations, and practices of the various corporations and persons engaged in the transaction of oil and other commodities, except water, and except natural and artificial

gas, by means of pipe lines, or partly by pipe lines and partly by
7 railroad, or partly by pipe line and partly by water, subject to the act to regulate commerce and the acts amendatory thereof, and of each of them, to determine whether such rates, classifications, regulations, or practices, or any of them, are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the said act, and to determine the manner and method in which the business of said corporation and persons, and each of them is conducted.

It is further ordered, That the following corporations and persons engaged in such transportation subject to said act to regulate commerce and acts amendatory thereof be, and each of them is hereby, made parties respondent to this proceeding, viz:

The Buckeye Pipe Line Company,
The Columbia Pipe Line Company,
The Crescent Pipe Line Company,
Cumberland Pipe Line Company (Incorporated),
Emery Pipe Line,
The Eureka Pipe Line Company,
Gulf Pipe Line Company,
Gulf Pipe Line Company of Oklahoma,
Higgins Oil & Fuel Company,
Indiana Pipe Line Company,
National Transit Company,
New York Transit Company,
Northern Pipe Line Company,
Producers & Refiners Oil Company (Limited),
Producers Oil Company (Limited),
Pure Oil Company,
South West Pennsylvania Pipe Lines,
Southern Pipe Line Company,
The Texas Company,
United States Pipe Line Company,
Acme Oil Company,
Anchor Oil & Gas Company,
8 Associated Oil Company,
Associated Pipe Line Company,
Central Oil Company of Los Angeles,
Cornplanter Refining Company,
Corsicana Refining Company,
Dougherty & Son Refining Company, W. H.;
Evangeline Oil Company,
Franklin Pipe Line Company,
Guffey Petroleum Company, J. M.;
Gulf Refining Company of Louisiana,
Industrial Pipe Line Company,
Kansas Cooperative Refining Company,
Kansas Crude Oil & Gas Company,
Kansas Natural Gas, Oil & Pipe Line Improvement Company,

Kasigan Oil, Gas & Power Company,
Manhattan Oil Company,
The Modelo Oil Company,
National Pipe Line Company,
National Refining Company,
The Ohio Oil Company,
Paragon Refining Company,
Prairie Oil & Gas Company,
Puente Oil Company,
Pure Oil Company,
Rio Bravo Oil Company,
Security Oil Company,
Standard Oil Company of California,
Standard Oil Company of Kansas,
Standard Oil Company of Louisiana,
Sun Company,
Sun Pipe Line Company,
Tidewater Oil & Pipe Company,
Tidewater Pipe Company (Limited),
Uncle Sam Oil Company,
Uncle Sam Oil Company of Kansas,
9 Union Oil Company of California,
The Union Petroleum Company of Philadelphia,
Union Pipe Line Company,
Vacuum Oil Company,
Wellsville Refining Company.

A true copy.

(Seal) Judson C. Clements, Chairman.

That said order was duly served on your petitioner. Thereafter, at certain hearings provided by the commission, testimony and other evidence having been offered, received, and considered by the commissioner, on the 28th day of March, 1912, the Interstate Commerce Commission made a further order and caused the same to be duly served on your petitioner and the other respondents in said proceeding, propounding certain questions of law to each and all of the respondents in said proceeding, and requesting and directing that respondents appear before said commission in the City of Washington on the 10th day of May, 1912, for the argument and hearing of the questions of law submitted as aforesaid.

9. That, as directed in said order, your petitioner appeared and submitted its brief and argument in writing. Afterwards, on the 3d day of June, 1912, the Interstate Commerce Commission made, rendered, and published its report, in the nature of findings of fact and conclusions of law, accompanied by a further order of said commission in said proceeding, a copy of which report and order is hereto attached marked "Exhibit A," and the same is hereby made a part of this petition.

10. That by the terms of said last-mentioned order your petitioner is required on or before September 1, 1912, to file with the Interstate Commerce Commission schedules of its rates and charges for the transportation of oil, as a common carrier, in compliance with the said commission's construction of the provisions of the act to regulate commerce. That your petitioner has not now and never has had any schedules of rates and charges for the transportation of oil. It has never transported nor offered to transport any oil other than its own oil. Its incorporation was procured, its stock subscribed and sold, for the purpose of engaging in a private business, in manner and form that said business is now and heretofore has been conducted by your petitioner. That the stockholders and directors of the Uncle Sam Oil Company have never given their consent, or in any manner authorized the managing officers of your petitioner to divert the property owned by it or any part thereof from the necessary private uses in which it is now employed, to the public service, or to the service of any other person, and they have no power to do so. That the pipe line of the Uncle Sam Oil Company can not nor can any part thereof be employed in the transportation of oil for the public or any other person without impairment and destruction of the value of the same to its owner as a necessary, economical, and efficient means of carrying on, conducting, and maintaining the business in which it is now engaged. That the order of said commission last above referred to and set out in Exhibit A to this petition, is illegal and void, for the reasons, first, because the Interstate Commerce Commission does not have and possess any jurisdiction or control over the pipe line of this petitioner, or any lawful authority to make such order; second, because said order, should the same be made effective and be enforced, would impose all the burdens, liabilities, and responsibilities of a common carrier upon this petitioner without its consent, without its power to assume them, and deprive it of its property, the use and control thereof, without due process of law, and in violation of the fourteenth amendments to the Constitution of the United States; and, third, because said order, should the same be enforced and become effective, would render the pipe line of your petitioner ineffective and inefficient for the purposes for which it was constructed and ever since has been used, and appropriate the same to the service of the public, to the exclusion of the use thereof by the owner, which would be a taking of the private property of your petitioner for a public use without just compensation, in violation of the fifth amendment to the Constitution of the United States.

11. Your petitioner further avers that if said order of the Interstate Commerce Commission is allowed to become and be effective many suits for penalties would be brought against your petitioner by many persons interested in said order and its enforcement and claiming to be injured by the acts of your petitioner, which suits would be prosecuted as aforesaid by very many persons in the judicial districts of the United States against your petitioner, whereby your petitioner would be subjected to a great multiplicity of suits.

and great loss and damage would be inflicted upon it, all of which would greatly injure and embarrass your petitioner in the transaction of its business, unless said order be obeyed, and your petitioner thereby surrender and be deprived of the use and enjoyment of its own private property, to its irreparable injury through the impairment and destruction of its ability to carry on the business in which it is now engaged and to which the present employment of its pipe line is essential and necessary.

12. Your petitioner further avers, notwithstanding the facts aforesaid, that said Interstate Commerce Commission maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of this honorable court, maintain the said order as an effective order, and institute or cause or suffer to be instituted the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience, and violative of the property rights of this petitioner.

12 13. Your petitioner therefore prays that upon the filing of this petition a temporary or interlocutory order be entered herein, suspending the said order of the said Interstate Commerce Commission and restraining the enforcement thereof and restraining the said Interstate Commerce Commission from taking any steps or instituting any proceedings to enforce said order, and upon the final hearing of this cause that a decree be entered herein setting aside and annulling said order of the said Interstate Commerce Commission herein complained of, and perpetually enjoining the enforcement of the same, and that respondent and its agents, servants, and representatives, and each and all of them be perpetually enjoined from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement of the same.

Your petitioner further prays that if any delay intervenes between the filing of this petition and the issuance of a temporary or interlocutory order, as prayed for herein, then and in that case an order be entered suspending the said order of said Interstate Commerce Commission, restraining and enjoining the enforcement thereof until the hearing and final determination of the application for a temporary or interlocutory order prayed for herein, and your petitioner further prays that it be granted such other and further relief in the premises as justice and equity may require.

Your petitioner further prays that your honors grant unto it a writ of subpoena to the United States of America and that due service thereof be made on the respondents and upon the Interstate Commerce Commission, commanding them at a certain day and under a certain penalty therein to be specified, to appear before this court and then and there full, true, and complete answer make to all and singular the premises; but not under oath (an answer under oath being hereby expressly waived), and to stand and abide by such order and decree herein as to the court shall seem meet and agreeable to equity and good conscience.

Albert L. Wilson,
Solicitor for Petitioner.

Appearance.

29 (Filed July 25, 1912.)

In the United States Commerce Court.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent.

Mr. George F. Snyder,

Clerk United States Commerce Court, Washington, D. C.:

I hereby enter the appearance of the Interstate Commerce Commission as intervening respondent, and of myself as its solicitor, in the above-entitled case.

Dated Washington, D. C., July 24, 1912.

Chas. W. Needham,
Assistant Solicitor.

30

No. 76.

In the United States Commerce Court.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent.

Order extending time to answer.

(Entered July 31, 1912.)

Upon application duly made in that behalf, and good cause being shown, it is ordered that the time within which the United States of America, respondent, and Interstate Commerce Commission, intervening respondent, may answer the petition filed in the above entitled cause be, and the same is hereby, extended to and including September 16, 1912.

Marlin A. Knapp,
Presiding Judge.

31

In the United States Commerce Court.

In Equity. No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent.

Interstate Commerce Commission, intervening respondent.

Answer of the Interstate Commerce Commission.

(Filed September 4, 1912.)

The Interstate Commerce Commission, intervening respondent in the above-entitled cause, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained,

for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

I.

This respondent admits that The Uncle Sam Oil Company, petitioner herein, is a corporation and was duly organized in February, 1905, under the laws of the Territory of Arizona for the purpose, among other things,
of transporting oil by means of pipe lines; and this respondent
32 alleges that in and by its said charter the petitioner is authorized to transport oil by pipe lines and that the petitioner is not restricted to the transportation of oil produced or owned by it, but on the contrary the petitioner may transport oil for any person, persons, firms, or corporations applying to it for such service; all of which will more fully appear by an inspection of its said charter, production of which charter or a certified copy thereof upon the hearing of this suit is hereby requested.

II.

Further answering, this respondent alleges that said petitioner has constructed a pipe line and is operating the same as hereinafter shown; that said petitioner is transporting crude oil by means of said pipe line from points in the State of Oklahoma, in what is known and is hereinafter described as the Mid-Continent field, to points in the State of Kansas; that said petitioner, as respondent is informed, also transports crude oil from said Mid-Continent field through its pipe line and over through route connections operated by other common carriers and delivers said oil at points in the State of Missouri and in States other than that at the point of origin of such shipments; that, the premises considered, the petitioner is engaged in interstate commerce subject to the regulating power of the Congress of the United States.

Further answering, this respondent admits that the petitioner is in
possession of, by lease or otherwise, and operates oil wells in the
33 Mid-Continent field; that it owns and maintains receiving and storage tanks and distributing stations in the States of Kansas, Oklahoma, and Missouri in connection with its said pipe-line transportation business, and that it owns and operates a refinery for refining crude oil near Cherryvale, in the State of Kansas, as alleged in said petition. But this respondent neither admits nor denies the allegations in said petition to the effect that the petitioner produces or owns all the crude oil which it transports in interstate commerce, or that all the crude oil transported by it as aforesaid, stored in its tanks, and delivered to and refined at the refineries, or delivered at stations owned by petitioner and from there marketed, is wholly owned by the petitioner. This respondent alleges that receiving and storage tanks are a necessary and essential equipment to and a part of the pipe-line transportation facilities operated by the petitioner; that whether said crude oil, transported by the petitioner as aforesaid, is produced at the points of origin from wells owned or

operated by the petitioner; or whether said crude oil so transported has been purchased by the petitioner at the points of origin; or whether all the crude oil so transported is owned by the petitioner; or whether all of the crude oil so transported is delivered to and refined at the refineries owned or operated by the petitioner; or whether the petitioner has refused to transport crude oil for other persons, firms, or corporations, or has not heretofore made or published rates or tariffs for such transportation services, are and each alleged fact aforesaid is wholly irrelevant and immaterial in determining the power of Congress in the premises, and whether under the said act to regulate commerce as amended the order in controversy in this suit is, or is not, a lawful and valid order binding and obligatory upon the petitioner herein.

34

Further answering, this respondent neither admits nor denies that the petitioner is by law prohibited from constructing or operating any railway, tramway, or from transporting by other means persons or property for hire as alleged in said petition, but if such be facts, as alleged, this respondent says that such facts are, and each of them is, wholly irrelevant and immaterial to the determination of the matters in controversy in this suit.

Further answering, this respondent denies each and every allegation in said petition which expressly or in effect alleges that the petitioner has no power to transport crude oil by means of pipe lines as a common carrier, or that petitioner can not transport crude oil from said mid-continent field for different and many independent shippers, receiving at the point of origin and delivering at the point of destination crude oil of like grade; or that petitioner can not transport through its pipe line crude oil for the public at reasonable rates to be fixed and published as required by the act of Congress aforesaid and by the order in question.

And this respondent avers that said petitioner is not compelled by said act, or by the order in question, to engage in, or to continue the business of, transporting crude oil by means of pipe lines from points in one State to points in another State; nor is the petitioner compelled by said act, or by said order, to put its said pipe line to the service of the public; but if the petitioner does engage in, or continue, the interstate transportation business aforesaid, it is, and will be, subject to the said act to regulate interstate commerce and must comply with the requirements and regulations of said act and with the orders of this respondent made under and in conformity with said act.

35

III.

Further answering, this respondent neither admits nor denies the several allegations of fact contained in paragraphs 3, 4, 5, 6, and 7 of said petition, but avers that the alleged facts, if true, are, and each is, wholly irrelevant and immaterial to the determination of the matters in controversy in this suit in view and upon consideration of the facts set forth in respondent's said report (Exhibit A hereto) and in this answer.

IV.

This respondent admits that it made the order complained of, and served the same upon the petitioner, and conducted the hearing referred to in paragraphs 8 and 9 of said petition; that the petitioner appeared at said hearing and then and there submitted the statement of facts set forth in the petition herein, with oral arguments and printed brief
36 thereon; that after due and full consideration of all the statement of facts, arguments, and briefs submitted by the petitioner as aforesaid this respondent, on the 3d day of June, 1912, made, rendered, and published, as required by said act, its report, findings, and conclusions therein, and made, entered, and served upon the petitioner the order in controversy; and that on July 18, 1912, at the request of the petitioner and other pipe-line companies, said order was amended by making the effective date thereof November 1, 1912.

This respondent alleges that said order was made after a full hearing regarding the matters involved therein had been given and accorded to the petitioner herein, and after due consideration of all the statement of facts, arguments, and briefs presented to respondent by said petitioner as aforesaid; that said hearing was instituted and conducted by this respondent in all respects as required by the said act to regulate commerce as amended; that notice of the hearing and copies of the report and order in controversy were duly served upon the petitioner; and that this respondent was fully empowered and authorized by the act aforesaid to make and enter said order. A copy of said report, entitled "No. 4199. In the Matter of Pipe Lines," is hereto attached, marked "Exhibit A," and the same is hereby made a part of this answer. A copy of the said order in question is hereto attached, marked "Exhibit B," and is also made a part hereof.

37 V.

Further answering, this respondent says that the petitioner herein made application to the Secretary of the Interior of the United States, at Washington, D. C., for a right of way for a pipe line over Indian lands from a point near Bartlesville, then in the Indian Territory, to a point on the State line of Kansas, near Caney, Kans., a distance of about twenty-three miles; that said application was made under the provisions of an act of Congress approved March 11, 1904 (33 Stat., 65), and the regulations of the department thereunder; that accompanying said application were maps showing the proposed pipe line, copy of charter, and other evidencial matter required by said act and regulations; that on or about the 21st day of January, A. D. 1907, there was filed a map of definite location; that the Secretary of the Interior on the 31st day of January, 1907, granted said application under and subject to the provisions of said act and the "regulations of December 21, 1906 (copy inclosed)"; that the petitioner accepted said grant of a right of way aforesaid and constructed a part of its pipe line thereover, and is now operating the same subject to all the provisions and reservations contained in said act and

the published regulations aforesaid, to which reference is hereby made. That said act, among other things, provided:

"That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for
38 the construction, operation and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe * * *. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior; * * *

"Sec. 2. The right to alter, amend, or repeal this act is expressly reserved."

That among the rules and regulations prescribed by the Secretary of the Interior, under authority of law, for the granting of rights of way to pipe-line companies, of date December 21, 1906, was the following:

"And no application for the construction of a pipe line will be approved unless the applicant agrees that such pipe line shall be held to be a common carrier and agrees to all the provisions hereof."

And also:

"The approval of any application for oil pipe lines and other privileges is on the condition that the permittees thereof shall accept and deliver shipments of oil at any regular station on their line."

That said regulations were in full force and effect at the time said right of way was approved by the Secretary of the Interior, accepted by petitioner, and its said line was located and constructed subject to the regulations aforesaid. (Reference is hereby made to the published regulations aforesaid issued by the Department of the Interior.)

39 That the acceptance of said right of way as aforesaid subjected the petitioner to all said laws and regulations, relating to the use thereof, then in force and which Congress should thereafter enact or authorize, and the petitioner, by its voluntary act, became a common carrier of oil.

VI.

This respondent alleges that the proceedings and order in controversy were had and made under, and in conformity with, the act of Congress entitled "An act to regulate commerce," as amended, which act provides, among other things, as follows:

"That the provisions of this act shall apply to any corporation * * * engaged in the transportation of oil * * * by means of pipe lines * * * who shall be considered and held to be common carriers within the meaning and purpose of this act. * * *;"

And—

"That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route

and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established."

That if, and so long as, the petitioner engages in the business
40 of transporting crude oil by means of pipe lines from points in one State to points in another State by the means and instrumentalities aforesaid, it is, by reason of the premises and the provisions of the act to regulate commerce aforesaid, to be considered and held to be a common carrier within the meaning and purposes of said act, and the petitioner is expressly required by said act to file with this respondent schedules of rates and charges for the transportation of oil, as aforesaid.

VII.

Further answering, this respondent says:

That the crude oil produced in the United States is described by "fields," and they are known as the Appalachian field, covering parts of the States of New York, Pennsylvania, West Virginia, southeastern Ohio, Kentucky, and Tennessee; the Lima-Indiana and Illinois field, covering parts of northwestern Ohio, Indiana, and Illinois; the Mid-Continent field, herein referred to, covering parts of the States of Kansas and Oklahoma; the Gulf field, covering parts of the States of Louisiana and Texas; the Caddo field, in Louisiana and Texas; and other fields in the States of California, Colorado, Wyoming, Michigan, and Missouri; that the annual products of crude oil within the United States, as shown by the official statistics for the calendar year 1910 (the last official figures available), was 209,556,048 barrels of the value of $127,896,328; that of this
41 total production the Mid-Continent field for the year aforesaid produced 53,157,386 barrels, of about the value of $31,974,082, or about one-fourth of the quantity and value of the total production of the United States; that the crude oil in the Mid-Continent field is produced from wells owned and operated by more than 2,000 operators.

A map showing the fields of production of crude oil east of the Rocky Mountains and the pipe lines, including the petitioner's, conveying crude oil to refineries, etc., is hereto attached marked "Exhibit C," and to which reference is hereby made for particular description thereof.

That crude oil produced east of the Rocky Mountains is not much used in its natural state, and its market is limited to the refineries of crude oil; that prior to 1906 the business of refining the crude oil and transporting it from the fields of production to the refineries was, to a large extent, transacted under a common management or unified control, the pipe line being called an adjunct of the refinery; that the cost of transportation by means of pipe lines is approximately from 20 to 35 per cent of the cost of transportation by any other instrumentality; that by reason of the premises the producers of crude oil were wholly dependent for the sale of their product upon transportation by pipe lines to the refineries, and by reason of their

location, as herein described, they could not sell or dispose of their said product except to the refineries controlling pipe lines; and that
42 by means of the monopoly of said pipe lines the refineries were able to, and did, unlawfully control the output and arbitrarily fix the price of crude oil at the points of production; that the combining of the business of transporting crude oil with the business of refining the same tended to, and did, create a monopoly and an unreasonable restraint of trade, and subjected the producers of crude oil, and the consumers of the refined products thereof, to great and unreasonable burdens and restraints in their trade, and was and is injurious to the public.

That by reason of the manner of conducting the business of transportation aforesaid, the inability of and the prohibition upon the producers of crude oil to have their oil transported by pipe lines as common carriers, and to select the refinery and markets to which they would ship, the State of Kansas, by legislative enactment approved February 28, 1905 (chap. 315, Secs. 1 and 2), declared that all pipe-line companies transporting crude oil should be common carriers; and the Department of the Interior in December, 1906, by said regulation duly promulgated and published, required all companies obtaining rights of way for pipe lines through Indian lands to be common carriers.

That in the exercise of its plenary power to regulate interstate commerce for the public welfare, and to prevent said unlawful monopoly of crude oil, the Congress of the United States, by acts approved June 29, 1906, and June 18, 1910, declared that any person or persons, firms, or corporations, engaged in interstate commerce "shall be considered
43 and held to be common carriers within the meaning and purpose of" the said act to regulate commerce.

This respondent alleges that by reason of the premises and the acts of Congress aforesaid, the petitioner, so long as it engages in interstate transportation of oil by pipe lines, is a common carrier subject to the said act to regulate commerce as amended.

VIII.

This respondent denies each and every allegation in said petition contained, to the effect that the ability of the petitioner to carry the oil which it produces in the Mid-Continent field will be unlawfully interfered with by segregating its transportation business from the business of producing and refining crude oil or by full compliance with the order in controversy.

This respondent also denies the allegation that petitioner can not transport crude oil through its pipe line for several owners or shippers or that it can not make rates for such transportation. On the contrary, respondent alleges, in view of the facts aforesaid, that the petitioner, with many other carriers, is sending shipments through connecting pipe lines and delivering single and independent shipments to stations and refineries, at points aforesaid, upon rates fixed

and determined therefor, and that the segregation of such shipments and making separate rates and charges therefore is practicable and of daily occurrence.

44 This defendant further denies each and every allegation in said petition contained to the effect or in substance that a compliance with said order will operate to deprive the petitioner of its property without due process of law, or that it will in any degree confiscate or take the property of the petitioner for public uses without due compensation, or that it will in any manner whatsoever deprive the petitioner of its constitutional rights, or any of them, guaranteed by the Constitution of the United States.

And this respondent alleges that in the exercise of its sovereign power over the subject of interstate commerce, Congress may prohibit or in any manner whatsoever regulate such interstate commerce, and all persons, firms, or corporations, while not compelled to engage in such interstate commerce, are, when so engaged, in duty bound to observe and conform to all laws and regulations, for the conduct of such interstate commerce, prescribed by Congress or by this respondent under the act to regulate commerce.

This respondent denies that this honorable court has jurisdiction to review or determine the wisdom or expediency of an act of the Congress of the United States involving public policy or public welfare in the regulation of any interstate commerce, as prayed in said petition; and this respondent avers that its findings of fact and its determination, set forth in said report and order, are binding and conclusive upon the petitioner and all others concerned therein.

45 All of which matters and things this respondent is ready to aver, maintain, and prove, as this honorable court shall direct and prays the same advantage as to each and all the matters and things aforesaid as this respondent would be entitled to if the same were specially pleaded or set forth by way of demurrer or motion to dismiss the petition.

And having fully answered said petition, this respondent prays to be hence dismissed, with its reasonable costs and charges in its behalf sustained.

Interstate Commerce Commission,
By Charles W. Needham, Its Solicitor.

City of Washington, District of Columbia, ss:

Charles A. Prouty, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true as to the matters within the knowledge of the commission, and as to the other matters he believes it to be true.

(Signed) Charles A. Prouty.

Subscribed and sworn to before me, George B. McGinty, a notary public within and for the District of Columbia, this 4th day of September, 1912.

(Seal) George B. McGinty, Notary Public.

IN THE UNITED STATES COMMERCE COURT.

No. 76.

The Uncle Sam Oil Company, Petitioner,

v.

United States of America, Respondent.

ANSWER OF THE UNITED STATES.

Comes now the United States of America by its counsel and for answer to the petition filed herein against it says:

I. Answering Paragraph I of the petition, this respondent admits that the petitioner is a corporation and that it is authorized and empowered to transport oil by means of pipe lines. Respondent denies that petitioner is a private mining and manufacturing corporation and denies that the petitioner is doing a private business. Respondent alleges that the petitioner is authorized and empowered by its charter to transport oil by pipe lines in interstate commerce for any person, firm, or corporation tendering the same for such transportation. As to the other matters and things alleged in Paragraph I of the petition, this respondent has no knowledge, and it neither admits nor denies the same, and if the same becomes material upon the hearing, it will require strict proof thereof.

II. Answering Paragraph II of the petition, this respondent denies the same and each and every part of the same.

III. Answering Paragraph III of the petition, this respondent admits that the petitioner owns and operates a crude-oil refinery near the City of Cherryville, in the State of Kansas, and has drilled and operated many oil wells on its leased lands in the Osage Indian Reservation. Respondent also admits that the petitioner has erected storage tanks at its stations in the States of Kansas, Oklahoma, and Missouri. Respondent admits that the petitioner has constructed and now owns and operates a pipe line extending from the oil fields near the City of Bartlesville, in the State of Oklahoma, to its refinery near the City of Cherryville, in the State of Kansas, and has connected its oil wells with pipe line by smaller gathering lines in the oil field. Respondent admits that since the year 1906 the petitioner has operated said pipe line from the fields in Oklahoma to its refinery in Kansas. As to the other matters and things alleged in said Paragraph III, this respondent has no knowledge, and it neither admits nor denies the same; and if the same becomes material upon the hearing it will require strict proof thereof.

IV. Answering Paragraph IV of the petition, this respondent says that in using the said pipe line for the sole and exclusive purpose of conducting and gathering its own oil from the wells to its refinery the petitioner has been and is acting illegally and unlawfully. Respondent alleges that as to such use

of said pipe line being necessary to the petitioner's business, the petitioner has constructed, owned, and employed, or has endeavored to construct, own, and employ its pipe lines, pumping stations, and delivery facilities, and equipment of every kind in the transportation of crude petroleum in order to make it appear that the same are essential and necessary in the conduct and prosecution of its own business and to carry on the business of a common carrier by pipe line and at the same time evade the obligations of the statutes in such cases made and provided relating to pipe lines. Respondent is informed and believes and upon such information and belief it charges, that any such alleged use of the said pipe line has been undertaken and is sought to be maintained for the purpose of evading and in violation of the statutes relating to pipe lines. Respondent has no knowledge that petitioner has never transported any oil for any other person, firm, or corporation and has never been requested to transport any oil for others from Bartlesville to Cherryville or vice versa, and it neither admits nor denies the same, and if the same becomes material upon the hearing it will require strict proof thereof. Respondent has no knowledge that the market price for crude oil has remained the same at Bartlesville as at Cherryville, and it neither admits nor denies the same, and if the same becomes material upon the hearing it will require strict proof thereof. Respondent denies that there has been and now is no reason why any person other than petitioner should desire to transport any

crude oil from Bartlesville to Cherryville or from Cherryville to Bartlesville. Respondent has no knowledge that there is no refinery for refining crude oil at Cherryville except the refinery of the petitioner, and it neither admits nor denies the same, and if the same becomes material upon the hearing it will require strict proof thereof. Respondent admits that the refinery of the petitioner is supplied from the wells through the pipe line of the petitioner.

V. Answering Paragraph V of the petition, this respondent has no knowledge that the petitioner has at no time held itself out to the public as willing to carry oil for the public by means of said pipe line, nor that it was willing to assume the duties and obligations of a common carrier, and if the same becomes material upon the hearing, it will require strict proof thereof. Respondent denies that petitioner has no power to engage in the business of a common carrier and that it has no facilities for receiving, storing, transporting, and delivering to another any oil that might be tendered for shipment, and alleges that the petitioner is fully authorized and empowered to engage in the business of a common carrier of crude oil by pipe line and is obligated so to do by the statutes of the States of Oklahoma and Kansas through which its said pipe line is operated and by the act of Congress in such case made and provided; and further alleges that the facilities for receiving, storing, transporting, and delivering crude oil which the petitioner now has are sufficient for the receiving, storing, transporting, and delivering

of any oil that may be tendered to the petitioner for that purpose. Respondent denies that the oil of the oil field in which the petitioner operates is of such different grades, quality, and value as that petitioner has no means whereby it could receive, store, transport, and deliver to another the same oil that should be tendered for transportation, and respondent alleges that in receiving, storing, transporting, and delivering crude oil from the said fields the petitioner would not be required to receive, store, transport, and deliver the same in any manner other or different than it now receives, stores, transports, and delivers its own oil. Respondent denies that it is physically impossible for petitioner to assume the duties and responsibilities of a common carrier to receive, store, transport, and deliver to the consignee or the owner the same oil which may be tendered for shipment.

VI. Answering Paragraph VI of the petition, this respondent denies that the transaction whereby petitioner produces the crude oil at the wells, gathers it from the wells, and pumps to its refinery, is a transaction wholly within the petitioner. Respondent is informed and believes, and upon such information and belief it charges, that any such alleged use of the said pipe line has been undertaken and is sought to be maintained for the purpose of evading and in violation of the statutes relating to pipe lines. Respondent denies that there is no other person concerned with it and no element of commerce in it; and denies that it is purely a private transaction; and denies that it does not come under the jurisdiction of the Inter-

state Commerce Commission; and denies that there is no law giving such commission any right or authority to interfere with or molest the petitioner in the use of said pipe line in the conduct of the petitioner's business, and denies that the petitioner's business is a private business. Respondent admits that the petitioner is the owner of said pipe line, but respondent denies that the petitioner has the right under the Constitution and laws of the United States to use, or to continue to use, the said pipe line in manner and form as in the petition alleged, without regulation thereof by the Interstate Commerce Commission. Respondent alleges that in receiving, storing, transporting, and delivering crude oil for persons tendering the same for such purposes, the petitioner is entitled to collect reasonable rates and charges therefor, according to law, and such use of the same would not be an interference of the petitioner with its proper ownership and operation of said pipe lines.

VII. Answering Paragraph VII of the petition, this respondent denies the same, and each and every part of the same.

VIII-IX. Answering Paragraphs VIII and IX of the petition, this respondent admits the same, and each and every part of the same.

X. Answering Paragraph X of the petition, this respondent admits that the petitioner has not now and never has had any schedules of rates and charges for the transportation of oil, but as to whether the petitioner never transported or offered to transport

any oil other than its own oil, respondent has no knowledge, and it neither admits nor denies the same, and if the same becomes material upon the hearing it will require strict proof thereof. This respondent alleges that it is immaterial for what purposes other than the transportation of oil by pipe line the incorporation of the petitioner was procured or its stock subscribed and sold; and further alleges that the charter of the petitioner expressly confers upon it the authority and power to receive, store, transport, and deliver crude oil, and that a compliance with the order of the Interstate Commerce Commission, sought to be annulled and enjoined, is within the authority and power of the petitioner, and that a refusal to comply with the order of the Interstate Commerce Commission is a definance of the said order and the failure to execute the authority and power conferred upon the petitioner by its charter. Respondent alleges that a compliance with the order of the Interstate Commerce Commission by the petitioner, through its stockholders and directors and its managing officers, is not, and could not, in any manner be a diversion of the property of the petitioner or any part thereof, as is alleged, or as is sought to be alleged, in the petition, but would be a compliance with the laws of the land. Respondent denies that the pipe lines of the petitioner, or any part thereof, can not be employed in the transportation of oil for the public or any other person without impairment and destruction of the value of the same to the owner, as is alleged in the petition, and alleges that the pipe

lines of the petitioner, and each and every part of the same, may be employed in the transportation of oil for the public, or any person, upon the payment of reasonable rates and charges therefor, without the impairment and destruction of the value of the same to the owner, or the impairment and destruction of the business of the petitioner, or any part of the same. And this respondent denies that the order of the Interstate Commerce Commission, referred to and set out in Exhibit A to the petition, is illegal and void for the reasons set forth and alleged in the petition. Respondent alleges that the Interstate Commerce Commission had and has full and complete jurisdiction and control over the petitioner in its ownership and operation of its pipe lines. Respondent denies that by its said order the Interstate Commerce Commission will, without the consent of the petitioner, deprive it of its property and the use and control thereof without due process of law in violation of the fourteenth amendment to the Constitution of the United States. Respondent denies that the order of the Interstate Commerce Commission, should the same be enforced and become effective, would render the pipe lines of the petitioner ineffective and inefficient, and would appropriate the said pipe lines to the service of the public to the exclusion of the use thereof by the owner, and denies that should said order be enforced and become effective, it would be the taking of private property of the petitioner for the public use without just com-

pensation in violation of the fifth amendment to the Constitution of the United States.

XI. Answering Paragraph XI of the petition, this respondent has no knowledge that if the said order is allowed to become effective that many suits for penalties are liable to be brought against petitioner by persons interested in said order and its enforcement and claiming to be injured by the acts of the petitioner, and that the petitioner would be subjected to a great multiplicity of suits, and that any loss and damage would be inflicted upon it, and it neither admits nor denies the same and if the same becomes material upon the hearing it will require strict proof thereof. Respondent denies that if said order is allowed to become effective, that the petitioner will be greatly injured and embarrassed in the transaction of its business. Respondent denies that if the said order becomes effective that the petitioner will be deprived of the use and enjoyment of its private property or that the petitioner will suffer any injury through the impairment and destruction of its ability to carry on its business as alleged in said paragraph.

XII. Answering Paragraph XII of the petition, this respondent admits that the Interstate Commerce Commission maintains and intends to maintain and will, unless the said order is enjoined or suspended by the order of the court, maintain the said order as an effective order, and will institute or suffer to be instituted judicial proceedings for the enforcement

thereof, but respondent denies that its acts and doings in that behalf are contrary to equity and good conscience and violative of the property rights of the petitioner.

XIII. Further answering the said petition, respondent alleges that the crude oil produced in the United States is described by "fields," and they are known as the Appalachian field, covering parts of the State-, of New York, Pennsylvania, West Virginia, Kentucky, and Tennessee; the Ohio, Indiana, and Illinois fields, covering parts of those States; the Mid-Continent field, herein referred to, covering parts of the States of Kansas and Oklahoma; the Gulf field, covering parts of the States of Louisiana and Texas; and smaller fields in the States of California, Colorado, Wyoming, Michigan, and Missouri. The annual products of crude oil within the United States, as shown by the official statistics for the calendar year 1910 (the last official figures available), were 209,556,048 barrels, of the value of $127,896,328; that of this total production the Mid-Continent field, in and through which the petitioner operates, for the year aforesaid produced 53,157,386 barrels, of the value of $31,974,082, or about one-fourth of the quantity and value of the total production of the United States.

Respondent alleges that the ownership of the stock of crude oil, the acquisition of any oil wells and the production of oil, the contracts with other producers for purchases of oil, and the market and delivery of oil by the petitioner, are all separate and apart from

and do not constitute a part of the transportation of oil by pipe lines.

Respondent further alleges that the buying, selling, and storing of oil produces a profit or occasions a loss independent of pipe-line operations and pipe-line transportation, and that it is entirely within the power of the petitioner, without injury or detriment to its business of buying, selling, and storing oil, and independently thereof, to receive, store, transport by pipe line, and deliver the oil of other persons, firms, and corporations tendering the same for such purposes.

Respondent alleges that the methods of arranging the operations of a pipe line as a common carrier would be affected only by the degree of uniformity in the quality of the oil placed in the pipes by the various shippers; that if the oil of different shippers is practically uniform in quality, shippers would ordinarily be willing to turn their oil directly into the common stock and to receive at destination an average mixture; if, on the other hand, the oils from different wells or from different small pools of a field vary widely in quality, two different methods might be pursued; that is to say, the pipe line company might keep shipments of different qualities separate, or an arrangement might be made for differentials in value of the different grades, so that a shipper putting a given grade of oil into the pipe line and receiving at destination an oil of different quality would either pay to or receive from the pipe-line company a

sum representing the difference in value. Respondent alleges that if the oil of the Mid-Continent field is of a quality that for purchasing, transporting, and selling the same it must be kept separate and apart from other grades of oil, that the petitioner would be compelled to transport the oil in that manner for itself, and in discharging its duties and obligations as a common carrier it would not be obliged to transport the oil of other persons, firms, and corporations in any manner other or different than it transports oil for itself.

Respondent alleges that the Texas Co., a corporation, the largest oil company in the United States excepting the Standard Oil Co. and its constituent companies, owns and operates a system of pipe lines from the Mid-Continent field southward to points in the State of Texas and on the Gulf of Mexico, and is acting as a common carrier of oil by pipe line in interstate commerce, and has published and filed tariffs in compliance with the act of Congress in such case made and provided, and is receiving, transporting, and delivering oils of various grades and qualities through the same pipe without any material mixture when reasonable care is taken, and that it is entirely practicable so to do.

Respondent alleges that the Gulf Pipe Line Co., which operates a pipe line extending from the Mid-Continent field, in the State of Oklahoma southward to Port Arthur, in the State of Texas, is acting as a common carrier of oil by pipe line in interstate commerce, and has published and filed tariffs in com-

pliance with the act of Congress in such case made and provided, and is receiving and transporting oil through the same pipe and making deliveries of a like quantity of a like quality of oil so received, and that it is entirely practicable so to do.

Respondent alleges that there are other persons, firms, and corporations in certain of the States east of the Mississippi River acting as common carriers of oil by pipe line in interstate commerce, and have published and filed tariffs in compliance with the act of Congress in such case made and provided, and are receiving, transporting and delivering oils through the same pipe in manner and form as the Texas Co. and the Gulf Pipe Line Co. are doing, and that it is entirely practicable so to do.

Respondent alleges that the petitioner is combining the business of producing and purchasing crude oil and the refining thereof and the sale of the refined products with the business of transporting the same by pipe line in interstate commerce, which results in a natural tendency to prefer and discriminate, and in thus combining the business of producing, purchasing, and refining crude oil and selling the refined products with the business of transporting the same by pipe line in interstate commerce, and its refusal to divorce the business of transporting crude oil in interstate commerce from the production, ownership, and refining thereof, and thus to avoid the natural tendency to prefer and discriminate, the petitioner is enabled effectively to and it does control the production and sale of crude oil and the transportation

thereof through and from the Mid-Continent field and the sale of the refined products, to the great prejudice and disadvantage of other producers of crude oil in the Mid-Continent field, who are without any outlet or market for their product except through the petitioner. In failing to publish and file its tariffs of rates and charges and to receive and transport crude oil for the producers of the Mid-Continent field in accordance therewith, upon equal terms and conditions with it and with each other, petitioner is enabled to and does compel such producers in the Mid-Continent field to sell the crude oil produced by them to the petitioner, who has the advantage of a pipe line, at such prices as the petitioner may dictate and upon such terms and conditions as it may impose, and in so doing the petitioner is making and will continue to make undue preferences and unjust discriminations in favor of and against communities and persons in the Mid-Continent field, and is making and will continue to make undue preferences in favor of itself as a producer and refiner of oil and unjust discriminations against other producers of crude oil. In thus combining the business of producing, purchasing, and refining crude oil and selling the refined products thereof with the business of transporting the same by pipe line in interstate commerce, and its refusal to divorce the business of transporting crude oil by the pipe line in interstate commerce from the production, ownership, and refining thereof, petitioner is enabled to and does carry on the business

of a common carrier in interstate commerce to the great preference and advantage to itself as a purchaser, shipper, and refiner of oil to the exclusion of and unjust discrimination against others and, as such, and in so doing, is violating the provisions of the act entitled "An act to regulate commerce," approved February 4, 1887, and the various acts amendatory thereof and supplementary thereto, and as such is avoiding regulation by the Interstate Commerce Commission.

Respondent alleges that in the year 1905 the Legislature of the State of Kansas passed an act relating to the transportation of oil by means of pipe lines whereby the public policy of the State of Kansas in this behalf was declared and became established, which said act provided that "all pipe lines laid, built, or maintained for the conveyance of crude oil within the State of Kansas are hereby declared to be common carriers and said conveyance of said oil shall be in the manner and under the restrictions in this act provided." Said act further provided, inter alia, that it shall be the duty of every person, firm, or association operating under such pipe line to provide suitable and necessary receptacles for receiving such oil for transportation and for storage at the place of delivery, and to receive and transport oil by pipe line at rates and charges not to exceed those specified in the said act. Petitioner is subject to the provisions of the said act and each and every part of the same, the contents of which are fully known to it, and

respondent prays leave to refer to the same upon the hearing hereof.

Respondent further alleges that in the year 1909 the Legislature of the State of Oklahoma passed an act relating to the transportation of oil by means of pipe lines, whereby the public policy of the State of Oklahoma in this behalf was declared and became established, which said act provides that "every corporation, joint stock company, limited copartnership, partnership or other person, now or hereafter engaged in the business of carrying or transporting crude oil, or petroleum, or any of the products thereof, for hire or compensation or otherwise, by pipe line or pipe lines, within this State, and by virtue of and in conformity to, any valid law incapable of revocation by any law of this State or of the United States, or by virtue of and in conformity to the provisions of this Act, shall be a common carrier thereof as at common law, and no such common carrier shall allow or be guilty of any unjust or unlawful discrimination, directly or indirectly, in favor of the carriage, transportation, storage, or delivery of any crude, stock, or storage oil, or any products thereof, in its possession or control, or in which it may be interested, directly or indirectly." Under and by virtue of the provisions of the said act, and for the purpose of acquiring necessary right of way, pipe-line companies are granted the right of condemnation by eminent domain, and the use of the highways in the State, for the purpose of transporting petroleum

by pipe lines, and the location, laying, construction, maintaining, and operation thereof. Corporations of other States or Territories, or of the United States, otherwise admissible to do business in the State of Oklahoma, may get the benefit of said act upon compliance with the laws and constitution of the State of Oklahoma. Petitioner is not organized under the laws of the State of Oklahoma, and as a foreign corporation doing business in said State is subject to the provisions of the said act and each and every part of the same, and respondent prays leave to refer to said act upon the hearing hereof.

Respondent alleges that pursuant to an act of Congress of the United States, approved March 11, 1904, relating to the granting of rights of way for pipe lines pumping stations, and storage tanks, and their construction, operation, and maintenance in connection with the transportation and storage of oil, when such lands are situated in Oklahoma and the Indian Territory, the Secretary of the Interior did promulgate certain rules and regulations for the granting of rights of way to pipe-line companies, wherein and whereby the public policy of the United States in this behalf was declared and became established, which said rules and regulations were in force from December 21, 1906, to and including June 10, 1909, and were, in part, in words and figures following, viz., "and no application for the construction of a pipe line will be approved unless the applicant agrees that such pipe line shall be held to be a

common carrier and agrees to all of the provisions hereof. * * * The approval of any application for oil-pipe lines and other privileges is on the consideration that the permittees thereof shall accept and deliver shipments of oil at any regular station on their line." Petitioner herein duly made application to the Secretary of the Interior for a right of way for its pipe line over Indian lands from Bartlesville, then in the Indian Territory, to a point at or near Caney, Kansas, a distance of about 25 miles, and which constitutes a part of the trunk pipe line of the petitioner; that said application was made under and in pursuance of the provisions of the said act of Congress and the said regulations of the Secretary of the Interior, and was accompanied with maps showing the proposed pipe line, and such other evidence as the Secretary of the Interior required before acting upon such application. On or about January 31, 1907, the Secretary of the Interior granted said application in pursuance of the said act of Congress and the said regulations, and the petitioner accepted the grant of a right of way thereunder and constructed a part of its pipe line thereover and is now operating the same. Petitioner is a common carrier engaged in the transportation of crude oil by pipe line in interstate commerce, and by reason of its acts aforesaid is estopped from divesting itself, or attempting to divest itself, of its obligations and duties as a common carrier, and is estopped from denying, or seeking to deny, that it is a common carrier.

Respondent alleges that at the hearing in the proceeding entitled, "In the Matter of Pipe Lines No. 4199," the matters and things in the foregoing answer by this respondent alleged were made fully to appear to and were before the Interstate Commerce Commission in the inquiry then being conducted in the said proceeding.

Respondent alleges that as shown by Exhibit A attached to the petition, complaint was made to the Interstate Commerce Commission that a large number of common carriers by pipe line, of which the petitioner was one, had established certain rates, classifications, and regulations which were unjustly discriminatory, unduly preferential and prejudicial, and otherwise in violation of the provisions of the act to regulate commerce and the acts amendatory thereof and supplementary thereto, and that the practices of said common carriers, and each of them, in the conduct of business and subject to said act were unjust, unreasonable, unjustly discriminatory, unduly preferential and prejudicial, and otherwise in violation of the provisions of said act, and that by reason thereof the commission instituted an inquiry on its own motion and inquired into the matters and things complained of; that after a full hearing the commission notified and required but 12 of the said large number of companies to file with the commission schedules of their rates and charges for the transportation of oil in compliance with the provisions of the act to regulate commerce. Respondent alleges

that of the said 12 companies, 7 thereof have filed petitions seeking to attack the order of the commission in question; the 5 remaining companies are engaged extensively in mining, producing, purchasing, selling, transporting by pipe line and delivering crude oil from one State to another, and are thus engaged in interstate commerce. They and each of them are named as parties to the order of the Interstate Commerce Commission, and are by it directed to file their schedules of rates and charges for the transportation of crude oil in compliance with the provisions of the act to regulate commerce. None of said 5 companies has filed a petition in this court to set aside and annul the said order or for an injunction against the same. This respondent is informed and believes, and upon such information and belief it charges, that each of the said 5 remaining companies in said order named is undertaking to comply with the provisions of the said order, and will comply with the provisions thereof if the said order is allowed to remain in force and effect, and will submit itself to the provisions of the act to regulate commerce and to regulation by the Interstate Commerce Commission. Respondent is informed and believes, and upon such information and belief it charges, that if a temporary restraining order is issued herein, or if the said order of the commission is finally annulled and enjoined, many of the other companies investigated by the commission which are complying with the provisions of the act to regulate commerce

in such a way as not to require further present action on the part of the commission, and the other 5 companies named in the order of the commission which have not filed petitions herein, or some of them, will attempt to divest themselves of their obligations and duties as common carriers by pipe lines and avoid regulation as such, and that much chaos and confusion will result, to the great prejudice and disadvantage of the producers, shippers, and refiners of crude oil throughout various States of the United States.

Respondent alleges that the Congress of the United States, in pursuance of its power to regulate commerce, by an act entitled "An act to regulate commerce," approved February 4, 1887, as amended June 29, 1906, whereby the public policy of the United States of America in this behalf was declared and became established, enacted "that the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this act."

Respondent further alleges that The Uncle Sam Oil Company, a corporation engaged in the transportation of oil by means of pipe lines in interstate commerce, has refused, and is now refusing, to com-

ly with the provisions of the said act to regulate commerce, in defiance of the provisions of the said act and in defiance of the order of the Interstate Commerce Commission, and that the failure of The Uncle Sam Oil Company to comply with the provisions of the act to regulate commerce, as directed by the order of the Interstate Commerce Commission, is inimical to the general welfare of of the people of the United States, contrary to law, and contrary to the public policy of the United States as declared and established by the Congress.

And this respondent denies each and every allegation in the said petition contained not herein specifically admitted, denied, or otherwise traversed.

Wherefore, having fully answered, this respondent prays that the petition be dismissed at the cost of the petitioner.

Blackburn Esterline,
Special Assistant to the Attorney General.

United States of America,
District of Columbia, ss:

Blackburn Esterline, being duly sworn, says that he is special assistant to the Attorney General of the United States and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes them to be true. He further states that he is authorized to sign the

said answer for the United States of America, the respondent in the said cause, by the Attorney General of the United States.

Blackburn Esterline.

Subscribed and sworn to before me this 16th day of September, A. D. 1912.

[Seal.] J. H. Mackey,
Notary Public, District of Columbia.

84 In the United States Commerce Court.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

United States of America, respondent.

Order.

(Entered October 17, 1912.)

Upon motion of counsel for the United States, the respondent consenting,

It is ordered, that leave be, and the same is hereby, granted the United States to file its amended answer herein forthwith, and the same is filed.

Martin A Knapp,
Presiding Judge.

IN THE UNITED STATES COMMERCE COURT.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

United States of America, respondent.

AMENDED ANSWER OF THE UNITED STATES.

Comes now the United States of America by its counsel and for amended answer to the petition filed herein says:

I. As to the purposes, character, and legal powers of the petitioner corporation, respondent refers to the charter thereof, and to the laws—Federal, State and Territorial—to which it has been and is subject.

II. Respondent denies that there would be no demand for the services of the petitioner as a common carrier.

III. While it is true that oils of varying grades can not be coincidently transported through pipe lines without some intermixture, it nevertheless is practicable, even with the facilities now possessed by the petitioner (or with slight modifications thereof) to keep the said oils so nearly separate and distinct during transit as to satisfy the practical requirements of the trade.

IV. It is also physically possible for the petitioner, even with its present facilities, to conduct the business of a common carrier of oil in a manner similar to that in which the business of elevating grain and in transportation the substitution of tonnage in transit are conducted; and so conducted the service would conform, or could readily be made to conform, to the practical commercial requirements of the trade.

V. Respondent denies that the act of Congress or the order of the commission, if allowed to become effective as against the petitioner, would compel the petitioner to close its refinery, or would injure its ability to compete with the Standard Oil Company.

VI. On February 16, 1906, the petitioner made application to the Secretary of the Interior for a right of way for the portion of its pipe line which lay within what is now the State of Oklahoma and was then the Indian Territory.

On March 26, 1906, this application was approved by the First Assistant Secretary of the Interior Department.

On December 21, 1906, there was promulgated and went into effect certain rules and regulations relating to the granting of rights of way for a pipe line, pumping station, storage tanks, and for their construction, etc., in Oklahoma and the Indian Territory, and in said rules and regulations it was provided, among other things, as follows:

> * * * and no application for the construction of a pipe line will be approved unless the applicant agrees that such pipe line shall be

held to be a common carrier and agrees to all of the provisions hereof. * * * The approval of any application for oil-pipe lines and other privileges is on the consideration that the permittees thereof shall accept and deliver shipments of oil at any regular station on their line.

After the said promulgation and going into effect of the said rules and regulations, the petitioner did, on January 21, 1907, file an application with the Secretary of the Interior for the approval of a new map therewith filed, which contained some variations of the line from the former map.

On January 31, 1907, this application was granted by the Department of the Interior, in accordance with the following letter dated January 31, 1907, addressed by the chief clerk of that department to the vice president of the petitioner:

J. H. Ritchie, Esq.,

Vice president The Uncle Sam Oil Company, Bartlesville, Indian Territory.

Sir: You are advised that the First Assistant Secretary of the Interior on January 23, 1907, in accordance with the recommendation of this office, approved the map filed by you in this office with your letter of January 21, 1907, showing the actual location of the pipe line, right of way for which was approved on March 26, and November 17, 1906, pursuant to the provisions of the act of Congress of March 11, 1904 (33 Stat. L., 65), the regulations of December 21, 1906 (copy inclosed), and subject

also to any prior, valid existing rights and adverse claims.

Very respectfully,

Frank M. Conser,
Chief Clerk.

VII. The facts stated in the report of the commission are true, and were found by due process of law.

VIII. Except as hereinabove denied or qualified, the allegations of the petition are admitted for the purposes of this case.

Winfred T. Denison,
Assistant Attorney General.

United States of America,
District of Columbia, ss:

Winfred T. Denison, being duly sworn, says that he is an Assistant Attorney General of the United States, that he has read the foregoing amended answer and knows the contents thereof, and that to the best of his information and belief the allegations therein made are true.

Winfred T. Denison.

Subscribed and sworn to before me this 14th day of October, 1912.

[Seal.]

Elizabeth Wright,
Notary Public, D. C.

89 In the United States Commerce Court.

Docket No. 76.

The Uncle Sam Oil Company, petitioner,

vs.

The United States, respondent.

Affidavit of H. H. Tucker, jr.

(Filed October 21, 1912.)

State of Kansas, Wyandotte County, ss:

H. H. Tucker, jr., of lawful age, upon his oath, says that he is president of the petitioner, and that during the years of 1905, 1906, and 1907 he was a director and secretary, treasurer, and general manager; that the matter of procuring the right of way for the pipe line mentioned in the answers of the respondents was in the charge of J. H. Ritchie; that the application for said right of way was made in February, 1906, and approved [illegible] by the department and the pipe line fully constructed thereunder and in full operation on and before the 16th day of November, 1906; that affiant has no recollection of ever hearing that there was any claim or pretence that petitioner would be compelled to become a common carrier on account of having applied for and accepted said right of way, and that petitioner never at any time agreed to accept said right of way on such terms; affiant has read the petition in this proceeding and knows the contents thereof and that the facts stated therein are true.

H. H. Tucker, Jr.

Subscribed and sworn to before me this 15th day of October, 1912.

(Seal) A. F. Goebel,

Notery Public, Wyandotte County, Kansas.

My commission expires on the 9 day of October, 1915.

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90 In the Commerce Court of the United States.

Docket No. 76.

The Uncle Sam Oil Company, petitioner,

vs.

The United States, respondent.

Affidavit of J. H. Ritchie.

(Filed October 21, 1912.)

State of Kansas, Wyandotte County, ss:

J. H. Ritchie, of lawful age, being first duly sworn, on his oath says that he is one of the directors and vice president of the petitioner,

The Uncle Sam Oil Company, and has held such positions since the organization of the company in February, 1905; that as such vice president he was in charge of the matter of procuring the right of way for the pipe line over the Indian lands mentioned in the answers of the respondents; that he had sole charge of said matter on behalf of the petitioner and conducted all proceedings therein; that he made the application for said right of way on the 16th day of February, 1906, under the law and rules and regulations then in force; that said application was filed in the Department on February 27th, 1906; that it was recommended for approval March 15th, 1906, and was approved by the honorable Thos. Ryan, First Assistant Secretary of the Interior, on the 26th day of March, 1906, under the law and rules and regulations then in force; that the law and rules then in force did not require the applicant for the right of way to agree that the pipe line should be a common carrier; that said pipe line was constructed upon said right of way so approved and in full operation on the 16th day of November, 1906; that as affiant now recollects the matter, one of the maps of the right of way did not have the field notes of the surveyor attached thereto, although such notes were furnished the department on December 5th, 1906, returned
91 the map to affiant to have the field noted attached thereto; that said map was amended in that particular and returned to the department on January 1, 1906, and was approved January 23rd, 1906; that affiant never had any notice or knowledge of the rules and regulations of the department dated December 21st, 1906, prior to January 1, 1907, when he returned said map to the department, or prior to the approval of said map by the department; that said pipe line was fully laid and in full operation long prior to December 21, 1906, and that it was laid upon the right of way applied for and approved prior thereto; that this affiant and the petitioner never at any time knew that the petitioner was required to agree that said pipe line should become a common carrier and this affiant and the petitioner never at any time consented that said pipe line should become a common carrier or that it would carry oil for any other person; that affiant has read the petition of the petitioner in this proceeding and knows the contents thereof and that the facts stated therein are true.

J. H. Ritchie.

Subscribed and sworn to before me this 15th day of October, 1912.

(Notarial seal.) A. F. Goebel,
Notary Public, Wyandotte County, Kansas.

My commission expires on the 9th day of October, 1915.

92 In the United States Commerce Court.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, et al., respondents.

Order for completion of the record.

(Entered March 29, 1913.)

It appearing that copies, duly certified by the Interstate Commerce Commission, of the following tariffs of common carrier pipe line companies, namely, (1) The Texas Company Pipe Line Tariff No. 5, I. C. C. No. 5; (2) National Transit Company Joint Tariff, I. C. C. No. 12; and (3) memorandum of the division of rates named in said I. C. C. No. 12, were offered by counsel for the United States at the hearing on the motion for preliminary injunction in the above-entitled cause and were received and considered by this court, but by oversight were not filed with the clerk.

It is ordered, this 29th day of March, 1913, that said certified copies of said tariffs be filed and made a part of the record in the above-entitled cause, nunc pro tunc, as of October 31, 1912.

Martin A. Knapp,
Presiding Judge.

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93 [Charles A. Prouty, chairman; Judson C. Clements, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, John H. Marble, secretary. In reply address "Interstate Commerce Commission."]

Interstate Commerce Commission, Washington.

I, John H. Marble, secretary of the Interstate Commerce Commission, do hereby certify that the documents hereto attached and more particularly hereinafter described are true copies of schedules lawfully filed with the said Interstate Commerce Commission of dates specified below, to wit:

The Texas Company Pipe-Line Tariff No. 5, I. C. C. No. 5, filed on May 21, 1908.

National Transit Company Joint Tariff, I. C. C. No. 12, filed on September 25, 1908.

Memorandum of the division of rate named in said I. C. C. No. 12, filed on May 28, 1912.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 25th day of October, A. D. 1912.

John H. Marble,
Secretary of the Interstate Commerce Commission.

[Seal of Interstate Commerce Commission.]

Filed March 29, 1913, nunc pro tunc as of October 31, 1912.

94 [T. T. C. No. 5. I. C. C. No. 5, cancelling and superseding I. C. C. Nos. 1, 2, 3, and 4. Received Interstate Commerce Commission, division of rates & transportation. 72055. May 21, 1908.]

The Texas Company Pipe-Line Tariff.

[The rates named by this tariff are for the interstate transportation of crude petroleum by the Texas Company's Oklahoma-Texas trunk pipe line and are subject to the regulations made part hereof and set forth on page 2, and are expressed in cents per barrel of 42 United States gallons.]

From the point in the Glen Pool (Oklahoma) now established for reception of crude petroleum into the Texas Company's trunk line.

To any one of the Texas points named below at the rate indicated in each instance, to wit:

To West Dallas (Texas) Station on said trunk line, at twenty (20) cents per barrel.

To Eleanor (Texas) Station on said trunk line, at twenty (20) cents per barrel.

To Corsicana (Texas) Station on said trunk line, at twenty-five (25) cents per barrel.

To Beaumont (Texas) Station on said trunk line, at thirty-five (35) cents per barrel.

To Port Arthur (Texas) Station on said trunk line, at thirty-seven and one-half (37½) cents per barrel.

Note.—All deliveries at destination to customer's vessels or to customer's tanks connected with the Texas Company's lines will be subject to a further charge of 2½ cents per barrel.

Note.—Upon demand for such appearing the company is prepared to consider proper promulgation of tariffs for intermediate points not covered by this or other tariffs in force.

"Issued under special permission of the Interstate Commerce Commission, No. 5522, of date of May 18, 1908."

Issued May 19, 1908. Effective June 1, 1908.

Subject to change under terms of law.

J. S. Cullinan,
President of the Texas Company, Houston, Texas.

95 The Texas Company.

Regulations.

The Texas Company will undertake interstate transportation of crude petroleum only by its trunk pipe line, receiving and delivering such through its own facilities, and not otherwise, subject to further provisions as follows:

1. Separate pipeage contracts for shipments, in accord with this tariff, and these regulations covering other proper details must be executed by the parties a reasonable time before the duty of transportation arises.

2. Crude petroleum will be received subject to the right and to the consequences of mixing such with and delivering such from common stock only, the minimum gravity at time of its reception for transportation to be 30 degrees Beaum; the usual and proper methods of measurements to apply.

3. Storage incident to and during transportation only is available and can be afforded, and the shipper must provide facilities for receiving the oil at destination.

4. The right to require prepayment or acceptable security for charges is reserved; also satisfactory assurance that the crude petroleum is free from liens and charges and that the shipper has the right to direct its disposition.

5. No limitations are prescribed at this time as to quantities, but reasonable limits will be required by the terms of pipeage contracts, and in the event of tenders in excess of capacities, including outstanding pipeage obligations, the right to reasonably allot and apportion is reserved by the Texas Company, and tender for transportation shall not be good for quantities in excess of such as is already in or available for immediate delivery into the Texas Company's pipe lines at the time of such tender.

6. Patrons may use, without additional charge, the company's private telegraph lines for messages incident to the business, the Texas Company, however, not to be liable for delivery of messages away from its offices nor for delay in transmission nor for interruption of service.

7. All crude petroleum transported under this tariff is subject to further charges for gathering preliminary to receiving the same into the main trunk line, according to the then existing schedule of such charges, which are subject to change and which at present are as follows:

Where the distance is 15 miles or more, 20 cents per barrel.

Where the distance is less than 15 miles but more than 10 miles, 15 cents per barrel.

Where the distance is less than 10 miles, 12½ cents per barrel.

Air-line distance to apply in accord with the Texas Company's field maps. If other delivery is desired, special arrangements must be made, covering additional charge proportionate to the service rendered, in no case to be less than 2½ cents per barrel.

8. In case of fire destroying any oil in the custody of the Texas Company's pipe-line department after oil has been received for transportation and before the same shall have been delivered to the consignee, the shipper shall stand a loss proportionately as the amount held for such shipper bears to all the oil, including its own, in the custody of the Texas Company's pipe-line department at the time of

such fire, and shall be entitled to have delivered only such proportion of such shipment as is left after deducting the proper proportion of the loss, as above, but in such event shall be required to pay carriage charges only on the quantity of oil delivered. Statements of quantities ascertained and computed from the records in the usual manner by the Texas Company shall be accepted as prima facie correct in the adjustment of a loss under this clause.

96 [I. C. C. No. 12. Cancelling and superseding I. C. C. No. 8. Received Interstate Commerce Commission, Division of Rates & Transportation. 125490. Sept. 25, 1908.]

Joint Tariff.

[Two copies to be posted at the receiving station, as required by law.]

National Transit Company, in Connection with South West Pennsylvania Pipe Lines (F X 3 No. 1), the Eureka Pipe Line Company (F X 3 No. 1), and Southern Pipe Line Company (F X 3 No. 1).

The rates named in this tariff are for the transportation of crude petroleum oil by pipe lines, subject to the regulations named within.

From Nedsky, Pa. (via Morgantown, W. Va.), to Fawn Grove, Pa., 32 cts.
Rates per bbl. of 42 gallons.

In addition to said rate, all oil tendered for shipment to Fawn Grove, Pa., at points in Pennsylvania other than Nedsky, Pa., will be subject to a further charge of 20c. per barrel of 42 gallons each, for gathering and transporting the same to Nedsky.

The rates named in this tariff are subject to change at any time upon the National Transit Co. giving the thirty (30) days' notice required by law.

Issued September 23d, 1908. Effective October 28th, 1908.

George Chesebro,
Secretary, National Transit Co., New York, N. Y.

97 [File I. C. C. No. 12.]

Regulations.

This company will receive crude petroleum for interstate transportation only to established delivery stations on its own lines, and lines of connecting pipe line companies, on the following conditions:

First. It will receive crude petroleum for interstate transportation when the shipper has provided the necessary facilities for receiving said petroleum as it arrives at destination.

Second. Orders for the shipment of any specified kind of such crude petroleum shall only become effective when orders from the shipper, in connection with orders from other shippers, for the same kind and quality of petroleum shall amount in the aggregate to seventy-five thousand (75,000) barrels, or more, consigned to the same point of delivery; and subject to this requirement, orders for shipment shall become operative in the order in which they shall have been received.

Third. It will forward such crude petroleum when there has been tendered to it by the shipper, individually, or by him and others, a quantity of the same kind and quality of crude petroleum amounting in the aggregate to not less than seventy-five thousand (75,000) barrels, all of which shall be consigned for delivery to the same delivery point.

Fourth. All such crude petroleum will be accepted for transportation only on condition that it shall be subject to such changes in quality while in transit as may result from the mixture of said petroleum with other petroleum in the pipe lines or tanks of this, or the connecting company, or companies.

Fifth. Crude petroleum will only be accepted for transportation when free from all liens and charges.

Sixth. This company is not engaged in the transportation of refined oil, and will not, therefore, accept the same for transportation.

Seventh. Any patron of this company wishing to send telegrams pertaining to the oil business will be allowed to do so free of charge. This does not include any delivery of telegrams at destination except at the company's office.

98 [Received Interstate Commerce Commission, Division of Tariffs, 34856, May 28, 1912.]

Memorandum of the division of rate named in joint tariff, I. C. C., No. 12, issued by the National Transit Company in connection with South West Pennsylvania Pipe Lines, The Eureka Pipe Line Company, and Southern Pipe Line Company, for the transportation of crude petroleum oil from Nedskey, Pa., to Fawn Grove, Pa., effective June 1, 1912. This memorandum is made in accordance with Conference Ruling No. 209.

The rate given was from Nedskey, Pa., to Fawn Grove, Pa., at 32 cents per barrel of 42 gallons. The division of this rate rests on verbal agreement, and is as follows:

	Cents per barrel of 42 gallons.
The Eureka Pipe Line Company	3.83
South West Pennsylvania Pipe Lines	5.07
Southern Pipe Line Company	19.34
National Transit Company	3.76
Total	32.00

Jos. Ball,
Secretary National Transit Company.

Oil City, Pa., May 27, 1912.

99 Journal entries.

No. 75. The Prairie Oil & Gas Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 76. The Uncle Sam Oil Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 77. Robert D. Benson, et al., petitioners, vs. The United States of America, respondent; Interstate Commerce Commission, et al., interveners.

No. 78. The Ohio Oil Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 79. Standard Oil Company, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

No. 80. Standard Oil Company of Louisiana, petitioner, vs. The United States of America, respondent; Interstate Commerce Commission, intervener.

Proceedings of October 29, 1912:

It was announced by the court that these causes would be heard together. Thereupon all of said causes came on for hearing upon the
100 applications for a preliminary injunction and No. 75 upon the motion of the United States to dismiss, and the arguments of counsel were commenced, Mr. W. S. Fitzpatrick, Mr. W. I. Lewis, and Mr. John G. Milburn appearing on behalf of the petitioners.

Proceedings of October 30, 1912:

Thereupon all of said causes came on for further hearing upon the applications for a preliminary injunction and No. 75 for further hearing upon the motion of the United States to dismiss, and the arguments of counsel were continued, Mr. John G. Milburn appearing on behalf of the petitioners; Mr. Albert L. Wilson on behalf of the Uncle Sam Oil Company, petitioner in No. 76; Mr. Blackburn Esterline on behalf of the United States; and Mr. Charles W. Needham on behalf of the Interstate Commerce Commission.

Proceedings of October 31, 1912:

Thereupon all of said causes came on for further hearing upon the applications for a preliminary injunction and No. 75 for further hearing upon the motion of the United States to dismiss, and the arguments of counsel were concluded, Mr. Charles W. Needham appearing on behalf of the Interstate Commerce Commission, Mr. Winfred T. Denison, Assistant Attorney General, on behalf of the United States; and Mr. John G. Milburn on behalf of the petitioners. There-

upon counsel for the United States was granted leave to file an affidavit, said affidavit to be first submitted to Mr. Milburn. Mr. Milburn, of
101 counsel for the petitioners, was granted leave to file a brief on monopoly within one week and opposing counsel were given one week thereafter in which to file briefs in reply. Thereupon said causes were taken under advisement by the court.

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160 In the United States Commerce Court.

October session, 1912.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent; Interstate Commerce Commission, intervener.

Order granting preliminary injunction.

(Filed March 14, 1913.)

This cause came on to be hear[illegible] at this session, and was argued by counsel; and thereupon, upon cons[illegible]ion thereof, it was ordered, adjudged, and decreed as follows, viz:

First. That a preliminary injunction be, and the same is hereby, issued, as prayed for in the petition, against the order of the Interstate Commerce Commission entered June 3rd, 1912, the effective date of the same having been extended to March 15th, 1913, notifying and requiring the petitioner to file with the Interstate Commerce Commission schedules of its rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce, a copy of which order is attached to the petition and made a part thereof; and that the said order and its force and effect be, and the same is hereby suspended, restrained, and enjoined until the further order of the court.

Second. That a duly certified copy of this order be forthwith served by the marshal of this court upon the Attorney General of the United States and the chairman of the Interstate Commerce Commission.

By the Court:

Martin A. Knapp,
Presiding Judge.

161 District of Columbia, ss:

I hereby certify that on the 14th day of March, 1913, I served the within order granting preliminary injunction on the chairman of the Interstate Commerce Commission by leaving a certified copy thereof with Alfred Holmead, assistant secretary.

March 14, 1913.

F. J. Starek, Marshal.

District of Columbia, ss:

I hereby certify that on the 14th day of March, 1913, I served the within order granting preliminary injunction on the Attorney General by leaving a certified copy thereof with Blackburn Esterline.

March 14, 1913.

F. J. Starek, Marshal.

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162 In the United States Commerce Court.

October session, 1912.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent, and Interstate Commerce Commission, intervening respondent.

Petition for appeal.

(Filed March 22, 1913.)

The United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the interlocutory order or decree of the Commerce Court, entered March 14, 1913, granting a preliminary injunction suspending and enjoining the order of the Interstate Commerce Commission until the further order of the court, by their respective counsel, pray an appeal to the Supreme Court of the United States, in accordance with section 2 of an act entitled "An act to create a Commerce Court," etc., approved June 18, 1910.

The particulars wherein the United States and the Interstate Commerce Commission consider said order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the United States and the Interstate Commerce Commission further pray that a transcript of the record, proceedings, and papers on which the said order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

J. C. McReynolds,
Attorney General of the United States.

Chas. W. Needham,
Solicitor for Interstate Commerce Commission.

Allowed:

Martin A. Knapp,
Presiding Judge of the United States Commerce Court in said cause.

163 In the United States Commerce Court.

October Session, 1912.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent, and Interstate Commerce Commission, intervening respondent.

Assignment of errors.

(Filed March 22, 1913.)

Come now The United States of America, respondent, and Interstate Commerce Commission, intervening respondent, by their respective counsel and in connection with their application for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court entered March 14, 1913, in the above-entitled cause.

The Commerce Court erred:

I.

In holding and adjudging that the amendment of June 29, 1906, to the act of Congress entitled "An act to regulate commerce," etc., approved February 4, 1887, which provides that "the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this act * * *," is unconstitutional and void, as in violation of the fifth amendment to the Constitution of the United States.

164 II.

In construing the said amendment of June 29, 1906, relating to pipe lines, as a declaration by Congress that all private pipe line companies doing business in interstate commerce shall become and be common carriers subject to the provisions of the act to regulate commerce, and in not construing the said amendment as a declaration by Congress that the transportation of crude oil in interstate commerce by means of pipe lines should thereafter be carried on only by common carriers subject to the provisions of the act to regulate commerce.

III.

In holding and adjudging that the receiving and storing stations and the market places in the fields of production of crude oil, and the inspecting, grading, measuring, purchasing, and receiving of oil thereat by petitioner does not constitute such public receiving and storing stations public markets for the purchase and sale of crude oil and a part of the transportation thereof in interstate commerce subject to regulation by Congress.

IV.

In holding and adjudging that the construction and operation of pipe lines upon and over the public streets and highways and upon and over the rights of way of common carriers by railroad subject to the act to regulate commerce and transporting interstate traffic through said pipe lines did not subject the said pipe line companies to the regulating power of Congress.

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V.

In holding and adjudging that the construction and operation of pipe lines over and upon the Indian lands under a permit granted by the Secretary of the Interior did not subject the petition to the regulating power of Congress, and did not render the said petitioner subject, under a declaration of Congress, to the provisions of the act to regulate commerce and regulation by the Interstate Commerce Commission.

VI.

In not holding and adjudging that the ownership and operation of the pipe lines by the petitioner and the manner and form in which the same are used in the purchase, transportation in interstate commerce, and sale of crude oil, and the combining of the business of the transportation of crude oil in interstate commerce with the business of dealing in that commodity, constitute monopoly and monopolistic tendencies, and that Congress has the power to destroy monopoly and to prevent monopolistic tendencies by declaring that the interstate transportation of crude oil by means of pipe lines shall be carried on by common carriers subject to the provisions of the act to regulate commerce.

VII.

In granting the motion for a preliminary injunction and in suspending and restraining the order of the Interstate Commerce Commission entered June 3, 1912, referred to in the petition, and in not denying the said motion, for that (a) the petition of the petitioner does not set forth any cause of action, and is insufficient to

166 warrant the granting of the preliminary injunction or to form the basis for any relief from the said order; (b) nor has the said petitioner shown that there is any equity in the said petition upon which to grant the preliminary injunction or to form the basis for any relief from the said order; (c) nor has the petitioner shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor has the petitioner shown that in making its said order the Interstate Commerce Commission violated any right of the petitioner protected by the Constitution of the United States or any other right of the said petitioner over which this court may exercise jurisdiction.

Wherefore the United States and the Interstate Commerce Commission pray that the said interlocutory order or decree of the Commerce Court, entered March 14, 1913, be reversed, annulled, and set aside, and that the petition be dismissed, and for such other and further order as may be appropriate.

J. C. McReynolds,
Attorney General of the United States.

Chas. W. Needham,
Solicitor for Interstate Commerce Commission.

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167 In the United States Commerce Court.

October session, 1912.

No. 76.

The Uncle Sam Oil Company, petitioner,

v.

The United States of America, respondent, and Interstate Commerce Commission, intervening respondent.

Order allowing appeal.

(Entered March 22, 1913.)

In the above-entitled cause, the United States of America and the Interstate Commerce Commission having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the Commerce Court, entered March 14, 1913, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided—

It is ordered and decreed, That the said appeal be, and the same is hereby, allowed as prayed and made returnable on the twenty-first day of April, A. D. 1913; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, papers, and proceedings to the Supreme Court of the United States.

Martin A. Knapp,
Presiding Judge of the United States Commerce Court.

168 United States Commerce Court.

No. 76.

The Uncl Sam Oil Company, petitioner,

vs.

The United Sta' of America, respondent; Interstate Commerce Commission, intervener.

United States of America, ss:

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 167, inclusive) to be a true and complete transcript of the proceedings had and papers filed in the above-entitled cause, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 4th day of April, A. D. 1913.

[Seal.] G. F. Snyder, Clerk.

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169 [Original.]

Citation on appeal.

United States of America, ss:

To The Uncle Sam Oil Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court wherein the United State of America and Interstate Commerce Commission are appellants and you are appellee, to show cause, if any there be, why the interlocutory order or decree rendered against the said appellants as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Martin A. Knapp, presiding judge of the United States Commerce Court, this 22d day of March, in the year of our Lord nineteen hundred and thirteen.

Martin A. Knapp,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 29th day of Mar., A. D. 1913.

Albert L. Wilson,
Solicitor for Appellee, The Uncle Sam Oil Company.

170 In the Supreme Court of the United States

October term, 1913.

No. 1054.

The United States of America, et al., appellants,
v.
Uncle Sam Oil Company, appellee.

Stipulation.

It is hereby stipulated and agreed, by and between the parties, by their respective solicitors, that the following documents contained in the record need not be printed, viz:

Opinion of the Commerce Court, announced and filed March 11, 1913;

Report of the Interstate Commerce Commission in the proceeding entitled "In the Matter of Pipe Lines, No. 4199";

and that upon the hearing the court and the counsel may refer to and use the printed copies of the said documents and each of them, which have been filed by the appellants in United States of America et al v. The Ohio Oil Company, No. 1012, to all intents and purposes as though printed in the record herein.

Blackburn Esterline,
Special Assistant to the Attorney General for the United States.

Chas. W. Needham,
Solicitor for Interstate Commerce Commission.

Albert L. Wilson,
Solicitor for Uncle Sam Oil Company, Appellee.

(Indorsed:) File No. 23629. Supreme Court U. S. October term, 1912. Term No. 1054. The United States et al., appellants, vs. The Uncle Sam Oil Company. Stipulation to omit part of the record in printing. Filed April 23, 1913.

(Indorsement on cover:) File No. 23629. U. S. Commerce Court. Term No. 1054. The United States of America and Interstate Commerce Commission, appellants, vs. The Uncle Sam Oil Company. Filed April 10th, 1913. File No. 23629.

EXHIBIT "B"

To the Petition for Rehearing

—

No. 507.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,
vs.
THE UNCLE SAM OIL COMPANY, Appellee.

BRIEF ON BEHALF OF THE UNCLE SAM OIL COMPANY, APPELLEE.

ALBERT L. WILSON,
Solicitor for Appellee.

Supreme Court, U. S. Filed Oct. 7, 1913. James H. McKenney, Clerk.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1913.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

THE UNCLE SAM OIL COMPANY, Appellee.

BRIEF AND ARGUMENT ON BEHALF OF THE UNCLE SAM OIL COMPANY, APPELLEE.

No. 1054.

Statement.

The Record, page 1, shows that this action was commenced in the United States Commerce Court by The Uncle Sam Oil Company, Appellee, on July 23, 1912, by filing in said court its petition for an injunction, and that the petition states the following facts (Record, pp. 1 to 8, inclusive):

completed and in full operation on November 16, 1906, upon the right-of-way thus approved. The record does show that a corrected map of the right-of-way thus approved was called for by the Department on December 5, 1906. Said map to have added thereto, as the correction called for, the field notes of the surveyor. This map was returned to the Department with the field notes called for attached, January 1, 1907, and in that form it was approved by the Secretary of the Interior, January 23, 1907, but in the approval of this map the Secretary distinctly states that the application for right-of-way had been approved March 26, 1906. (Record, page 45.)

The record further shows that the rules and regulations of the Interior Department were amended in 1909, and that portion which required the pipe lines to become common carriers was omitted from the rules and all matters touching that question were thereby repealed. (Commerce Court opinion, page 45.) The record does not show that the appellee had any knowledge or notice of the rules and regulations, dated December 21, 1906, when it returned to the Department the map with the field notes of the surveyor attached, but does show that the appellee had no knowledge or notice of the rules and regulations of December 21, 1906, prior to their repeal in 1909, and that said right-of-way was applied for and accepted and said pipe line laid thereon under the law and rules and regulations existing between February 17th and November 16th, 1906, and that appellee at no time had knowledge or notice that it would be required to consent that its pipe line should be a common carrier, and that at no time did it give such consent. (Record, pages 47, 48.)

The petition of the appellee expressly waives an answer under oath. (Record, page 8.) Therefore, the answer of appellants, while verified, could not be used as evidence on the hearing for the temporary injunction. All of the allegations of the petition of the appellee were supported by the affidavits of two witnesses. (Record, pages 47 and 48.) And none of the allegations were denied in any manner except by said answer.

The appellant Interstate Commerce Commission, in its answer (Record, page 10) says: "This respondent neither admits or denies the allegations in said petition to the effect that the petitioner produces or owns all the crude oil which it transports." And appellant The United States makes no denial of said fact in its amended answer (Record, pages 43 to 46, inclusive.) And neither of the answers of appellants controvert the material facts stated in the petition of the appellee. The court, therefore, was bound to assume that the facts stated in the petition of the appellee were true. Finding these facts to be true, the court granted the temporary injunction prayed for, and this appeal is prosecuted by appellants to obtain a reversal of said order.

1. That appellee, The Uncle Sam Oil Company, was duly and legally incorporated as a private corporation under the laws of the Territory of Arizona in February, 1905, for the purpose of producing crude petroleum, transporting it from its oil wells to its refineries, refining and marketing the same, and that ever since said incorporation appellee has been and now is a private mining and manufacturing corporation, existing under the laws of Arizona and doing a private business according to law.

2. That on the date of its said incorporation the law under which it was incorporated prohibited it from constructing or operating any railway, tramway, or other means for transporting persons or property for hire, and specifically provided that appellee should have no power to construct or operate any means for transporting persons or property except such as may lead from the principal works or place of business of appellee to some navigable stream, or to some existing railroad, turnpike, or public highway, and that said law then became and now is a part of the charter of appellee, and thereby appellee has no power to engage in the business of transporting persons or property as a common carrier.

3. That immediately after the date of its incorporation as aforesaid, appellee created, at large expense, one of its refineries for refining crude petroleum, near the city of Cherryvale, in the State of Kansas, and drilled in many oil wells on its leased land in the Osage Indian Reservation, in the State (then Territory) of Oklahoma; that it markets its refined products by establishing distributing stations in the trade centers most accessible to each of its

refineries, at which stations it has erected large storage tanks and equipment, and has tank wagons to make delivery of the products which it ships to said stations by the carload; that it now has about eighty stations in Kansas, Oklahoma and Missouri depending chiefly upon said refinery for their supply of refined oils; that it applied to the Atchison, Topeka & Santa Fe Railway Company, the only railway line extending from the oil wells of appellee to the said refinery of appellee, and demanded that said railway company should transport the oil from the wells to said refinery and at a fair and reasonable rate; that at said time appellee was producing, refining, and marketing its oil in competition with The Standard Oil Company, which company had its vice-president and active manager, H. H. Rogers, and other representatives upon the board of directors of said railway company; that said railway company established a freight rate of 39 cents per barrel on crude petroleum, from the oil wells of appellee, near the city of Bartlesville, Oklahoma, to the refinery of appellee, near the city of Cherryvale, Kansas, a distance of approximately sixty miles, and provided that appellee should provide the tank cars in which such crude oil should be shipped; that the market price of crude oil at that time was only 35 cents per barrel, and the price of refined oil was such as to make said freight rate prohibitive; that it was excessive, unreasonable, and unjust; that appellee could not pay said rate and continue its competition with the Standard Oil Company with the products of said refinery; that to avoid such ruinous freight rate appellee was compelled to and did construct a three-inch pipe line, extending from near its oil wells and near the said

city of Bartlesville, in the State of Oklahoma, to its refinery near the said city of Cherryvale, in the State of Kansas, and connected its said oil wells with said pipe line by smaller gathering lines in the oil field; that since in the year 1906 appellee has operated said pipe line, pumping its own oil from the wells in Oklahoma to its said refinery in Kansas, and supplied said distributing stations from said refinery, and maintained its competition with the Standard Oil Company, in spite of said freight rate.

4. That during all of the time since constructing said pipe line, appellee has used the same for the sole and exclusive purpose of conducting or gathering its own oil from the wells to its refinery, and such use has been necessary; that appellee has never transported any oil for any other person, firm, or corporation; that appellee during all of said time has never been requested to transport any oil for others from Bartlesville to Cherryvale or *vice versa;* that the market price for crude oil has remained the same at Bartlesville as at Cherryvale, and there has been and now is no reason why any person, other than appellee, should desire to transport any crude oil from Bartlesville to Cherryvale or from Cherryvale to Bartlesville; that there is no refinery for refining crude oil at Cherryvale except said refinery of appellee, and it is supplied from the wells through said pipe line.

5. That appellee has at no time held itself out to the public as willing to carry oil for the public by means of said pipe line, nor that it was willing to assume the duties and obligations of a common carrier; that appellee has no power to engage in the business of a common carrier; that it has no facili-

ties for receiving, storing, transporting, and delivering to another, any oil that might be tendered for shipment; that the oil in that oil field is of different grades, quality and value, and appellee has no means whereby it could receive, store, transport, and deliver to another the same oil that should be tendered for transportation; that under these conditions it is physically impossible for appellee to assume the duties and responsibilities of a common carrier to receive, store, transport, and deliver to the consignee or owner the same oil which may be tendered for shipment.

6. That the transaction whereby appellee produces the crude oil at the wells, gathers it from the wells, and pumps it to its refinery as above stated, is a transaction wholly within appellee; that there is no other person concerned with it and no element of commerce in it; that it is purely a private transaction, and does not come under the jurisdiction of the Interstate Commerce Commission; that there is no law giving said Commission any right or authority to interfere with or molest appellee in the free use of its said pipe line in the conduct of its said private business; that appellee is the lawful owner of said pipe line, and has the right under the Constitution and laws of the United States to possess, use and enjoy said pipe line free from the dominion, interference or control of said Interstate Commerce Commission or anyone else; that the *right to refuse to surrender said pipe line to the public is property belonging to appellee* and cannot be taken from appellee without due process of law.

7. That said pipe line is necessary to enable appellee to prosecute its business and maintain its

competition with the Standard Oil Company; that the entire capacity of said pipe line is and will be constantly required to supply the refineries of appellee; that appellee anticipates that in the near future it will be necessary to enlarge the line to meet the requirements of appellee's own private demands thereon, and that if appellee should be required to surrender to the public the use of said pipe line, it would be compelled to close its said refinery at Cherryvale, Kansas, for lack of facilities to transport its own oil from its wells to its said refinery; that its private business would very injuriously be affected, and its ability to maintain its competition with the Standard Oil Company in the territory now supplied by said refinery would thereby be greatly diminished, if not destroyed.

8. That heretofore the Interstate Commerce Commission, upon its own motion, instituted certain proceedings entitled "In the Matter of Pipe Lines, No. 4199," for the purpose of determining its jurisdiction over and concerning certain pipe lines in the United States, among which is the pipe line of The Uncle Sam Oil Company. Appellee and various other corporations and partnerships were made respondents, and on the 8th day of June, 1911, the Interstate Commerce Commission made a certain order, set out in full in the petition.

That said order was duly served on appellee. Thereafter, at certain hearings provided by the Commission, testimony and other evidence having been offered, received and considered by the Commission, on the 28th day of March, 1912, the Interstate Commerce Commission made a further order and caused the same to be duly served on appellee and the other

respondents in said proceeding, propounding certain questions of law to each and all of the respondents in said proceeding, and requesting and directing that respondents appear before said Commission in the City of Washington on the 10th day of May, 1912, for the argument and hearing of the questions of law submitted as aforesaid.

9. That, as directed in said order, appellee appeared and submitted its brief and argument in writing. Afterwards, on the 3d day of June, 1912, the Interstate Commerce Commission made, rendered, and published its report, in the nature of findings of fact and conclusions of law, accompanied by a further order of said Commission in said proceeding, a copy of which report and order is attached marked Exhibit "A," and made a part of the petition.

10. That by the terms of said last mentioned order appellee was required on or before September 1, 1912, to file with the Interstate Commerce Commission schedules of its rates and charges for the transportation of oil, as a common carrier, in compliance with the said Commission's construction of the provisions of the Act to Regulate Commerce. That appellee has not now and never has had any schedules of rates and charges for the transportation of oil. It has never transported nor offered to transport any oil other than its own oil. Its incorporation was procured, its stock subscribed and sold, for the purpose of engaging in a private business, in manner and form that said business is now and heretofore has been conducted by appellee. That the stockholders and directors of The Uncle Sam Oil Company have never given their consent, or in any manner authorized the managing officers of

appellee to divert the property owned by it or any part thereof from the necessary private uses in which it is now employed, to the public service, or to the service of any other person, and they have no power to do so. That the pipe line of The Uncle Sam Oil Company cannot, nor can any part thereof be employed in the transportation of oil for the public or any other person without impairment and destruction of the value of the same to its owner as a necessary, economical and efficient means of carrying on, conducting and maintaining the business in which it is now engaged. That the order of said Commission last above referred to and set out in Exhibit "A" to the petition, is illegal and void, for the reasons, *first*, because the Interstate Commerce Commission does not have and possess any jurisdiction or control over the pipe line of appellee, or any lawful authority to make such order; *second*, because said order, should the same be made effective and be enforced, would impose all the burdens, liabilities and responsibilities of a common carrier upon appellee without its consent, without its power to assume them, and deprive it of its property, the use and control thereof without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States, and *third*, because said order, should the same be enforced and become effective, would render the pipe line of appellee ineffective and inefficient for the purpose for which it was constructed and ever since has been used, and appropriate the same to the service of the public, to the exclusion of the use thereof by the owner, which would be a taking of the private property of appellee for a public use without just compensation,

in violation of the Fifth Amendment to the Constitution of the United States.

11. Appellee further avers that if said order of the Interstate Commerce Commission is allowed to become and be effective, many suits for penalties would be brought against appellee by many persons interested in said order and its enforcement, and claiming to be injured by the acts of appellee, which suits would be prosecuted as aforesaid by very many persons in the judicial districts of the United States against appellee, whereby appellee would be subject to a great multiplicity of suits, and great loss and damage would be inflicted upon it, all of which would greatly injure and embarrass appellee in the transaction of its business, unless said order be obeyed, and appellee thereby surrender and be deprived of the use and enjoyment of its own private property, to its irreparable injury through the impairment and destruction of its ability to carry on the business in which it is now engaged and to which the present employment of its pipe line is essential and necessary.

12. Appellee further avers, notwithstanding the facts aforesaid, that said Interstate Commerce Commission maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of the Court, maintain the said order as an effective order, and institute or cause or suffer to be instituted the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience, and violative of the property rights of appellee.

13. Appellee therefore prayed that upon the filing of the petition a temporary or interlocutory

order be entered therein, suspending the said order of the said Interstate Commerce Commission and restraining the enforcement thereof and restraining the said Interstate Commerce Commission from taking any steps or instituting any proceedings to enforce said order, and upon the final hearing of the cause that a decree be entered therein setting aside and annulling said order of the said Interstate Commerce Commission therein complained of, and perpetually enjoining the enforcement of the same, and that appellants and its agents, servants, and representatives, and each and all of them be perpetually enjoined from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement of the same.

Appellee further prayed that if any delay intervened between the filing of the petition and the issuance of a temporary or interlocutory order, as prayed for therein, then and in that case an order be entered suspending the said order of said Interstate Commerce Commission, restraining and enjoining the enforcement thereof until the hearing and final determination of the application for a temporary or interlocutory order prayed for therein, and appellee further prayed that it be granted such other and further relief in the premises as justice and equity may require.

Appellee further prayed that the court grant unto it a writ of subpoena to the United States of America, and that due service thereof be made on the appellants the United States and the Interstate Commerce Commission, commanding them at a certain day and under a certain penalty therein to be specified, to appear before the court and then and

there full, true and complete answer make to all and singular the premises; but not under oath (an answer under oath being thereby expressly waived), and to stand and abide by such order and decree therein as to the court shall seem meet and agreeable to equity and good conscience.

To this petition the appellants, the United States and the Interstate Commerce Commission as intervenor have filed answers which practically admit the material facts stated in the petition, but set forth certain reasons why, as they claim, appellee should be decreed a common carrier and subject to the rules and regulations of the Interstate Commerce Commission. The answers allege that a part of the pipe line of the appellee was laid upon a right-of-way secured from the Indians through the Secretary of the Interior, and that said right-of-way was applied for and accepted by the petitioner under rules and regulations of the Interior Department, dated December 21, 1906, which provided that the person applying for and accepting the right-of-way should consent that the pipe line should be a common carrier. (Record, pages 9 to 46, inclusive.) But the record (pages 45 and 47, 48) shows that the application for the right-of-way for this pipe line was made by appellee on February 16, 1906, and filed in the department February 27, 1906; that the same was recommended for approval March 15, 1906, and approved by Thos. Ryan, First Assistant Secretary of the Interior, March 26, 1906, under the law and rules then in force which did not require the applicant to consent that the pipe line should be a common carrier. This record further shows that the pipe line was

BRIEF AND ARGUMENT.

First: The provisions of the Interstate Commerce Act apply only to common carriers at common law.

I. This is the reasonable interpretation of the language of the Act itself.

Section 1 of the Act was entirely re-enacted by Sec. 7 of the Act of June 18, 1910. As so amended, Section 1 reads in part as follows (italics mine):

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons *engaged* in the *transportation* of oil * * * by means of pipe lines or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph and telephone and cable companies * * * *who shall be considered and held to be common carriers within the meaning and purpose of this Act,* and to *any common carrier or carriers engaged* in the *transportation* of passengers or property wholly by railroad * * *."

1. The words italicized, "*who shall be considered and held to be common carriers within the meaning and purpose of this Act,*" must be held to qualify and restrict the language "any corporation, etc., *engaged in the transportation* of oil * * * by means of pipe lines, etc." That is to say, the Act is to be interpreted as if it said that its provisions "shall apply to any corporation" (who shall be considered

and held to be *a common carrier at common law)* * * * "engaged, etc., * * *, shall be considered and held to be," a common carrier under the Act.

2. Otherwise it is necessary to assume that the Act is to be construed to mean that its provisions shall apply "to any corporation, etc., engaged in the transportation of oil * * * by means of pipe lines, etc.," * * * *and they* "shall be considered and held to be common carriers within the meaning and purpose of this Act." But the principal provisions of the Act apply, and originally applie' only to railroads, and the Act specifically limits their application to those railroads which are common carriers. A construction should not be favored which makes Congress, in the same Act, adopt a different policy in regard to pipe lines from that adopted in regard to railroads, with which the Act is chiefly concerned. Had that been its intention, it could and should have been clearly expressed. Instead of saying "who shall be considered and held to be common carriers within the meaning and purpose of this Act" it would have said "who are hereby declared to be common carriers within the meaning and purpose of this Act." The omission of language clearly having that effect is of vital significance, particularly when it is sought to bring corporations and persons within the Act as common carriers who are not common carriers in any sense known to the law.

Said Section 7 defines the word transportation as used in said Act in the following language:

> "The term 'transportation' shall include cars and other vehicles and instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied,

for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This is what Congress meant by the word "transportation" in the clause making the Act apply to any corporation or person "engaged in the transportation of oil." In other words the Act is made to apply only to those "engaged" in the "receipt," "shipment," "storage," and "delivery" of oil. This means those engaged in furnishing such facilities and service for others. The words "receipt," "storage" and "delivery" would not be used in describing the business of appellee, but are necessary in the description of the business of one who receives, transports, stores and delivers oil for others. In fact, the entire Act is taken up with provisions regulating the conduct of common carriers with the public and it has no application to appellee or its business as set forth in the petition.

"Of two constructions equally warranted by the language of an amendment, that is to be preferred which best harmonizes with the general tenor and spirit of the act amended."

Griffins Case, Chase (U. S.) 364;
Van Riper v. *Essex Public Road Co.*, 38 N. J. L. 23.

In *Wade* v. *Lumber Company*, 74 Fed. 517 (C. C. A., 5th Circuit, 1896), the court was considering an article of the State Constitution of Louisiana, which

provided, in substance, that all railroads were public highways and all railroad companies were common carriers. At page 521 the court said:

> "But for the earnestness with which the argument was presented in this court, we would not suppose that the learned counsel would seriously contend that Article 244 of the state constitution, dealing with corporations of public improvement and public utility, was intended to, or could be so construed as to, make out of a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for private purposes, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar mill, and used for carrying cane thereto, should be declared a common carrier. * * * The proposition that an individual or corporation may build a railroad wholly on his own land, for his own business, without making the same a common carrier, we do not doubt."

Judson on Interstate Commerce, 2d Ed. (1912), at page 220, says in part, referring to the language of Sec. 1 of the Interstate Commerce Act:

> "As to the owners of pipe lines who are not common carriers and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the Act."

3. If, however, the words "*who shall be considered and held to be common carriers within the meaning and purposes of this Act*" were to be con-

strued as a declaration by the Act itself that the corporations and persons described are to be deemed common carriers within its provisions, the question would still remain, who are the corporations and persons so described? The language is "any corporation or any person or persons *engaged* in the transportation of oil * * * by means of pipe lines * * *." That means corporations or persons engaged in such transportation as a business—that is, for profit. It does not mean the transportation by a corporation or person of oil through its or his own pipe lines merely as an adjunct to the operation of the manufacturing business in which it or he is engaged. Do we speak of a company engaged in manufacturing which operates a railroad on its own right-of-way to bring to it coal or ore from some nearby railway system as "*engaged*" in the transportation of coal or ore? It is transporting coal and ore by railroad, but it would not be described as "engaged" in the transportation of coal and ore, because the obvious implication of that language is that it is engaged in it as a business. In other words, a mining or manufacturing company is engaged in mining and manufacturing, to which the transportation by itself of articles which it uses in its mining or manufacturing may be an incident, and the fact that it is such an incident would not bring the company within the description of one *engaged* in transportation. That language can only be appropriately used when transportation is the direct and principal occupation or business of the corporation. This is particularly true in view of the fundamental public purposes of the Act.

In *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 145 U. S. 263, at page 276, Mr. Justice Brown said:

> "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

See, also, *Interstate Commerce Commission* v. *Harriman*, 211 U. S. 407, 418.

These objects have no application or pertinency to a private railroad or pipe line; and the fact that they have not furnishes a convincing reason against a construction of the Act which would bring such railroads or pipelines within its terms or operation. To apply the Act to a new subject presupposes an existing public use in connection with it in need of the regulation which the Act provides.

4. From no point of view can a person or corporation engaged in the movement of oil by pipe lines "be considered and held to be" a common carrier by any authority, judicial or administrative, unless it actually is a common carrier; and such a holding is, I submit, necessary to bring a pipe line within the Act.

II. If Section 7 of the Act is to be construed as applying to all pipe lines, including such as have been used exclusively to transport the oil of their owners, then that part of the Act is unconstitutional.

But the Court, to preserve the Act, will adopt that construction which is consistent with the Constitution, *or which avoids grave constitutional objections.* Hence, the construction contended for is the proper one.

U. S. v. *Del. & Hudson Co.*, 213 U. S. 366, 407-8.

Interstate Commerce Commission v. *Harriman*, 211 U. S. 407, 422.

III. If Section 7 of the Act is to be construed to apply to every corporation which transports its own oil by private pipe line for the purposes of its own business the provisions relating to pipe lines clearly violate the Fifth Amendment of the U. S. Constitution, in that they deprive the owners of private pipe lines of property without due process of law, and take private property for public use without compensation.

Monongahela Navigation Co. v. *United States*, 148 U. S. 312, 324.

United States v. *Lynah*, 188 U. S. 445.

United States v. *Welch*, 217 U. S. 333, 339.

Pumpelly v. *Green Bay Company*, 13 Wall. 166, 179.

In *Monongahela Navigation Co.* v. *United States, supra*, Mr. Justice Brewer, at pages 324, 325, said (italics mine):

> "The first ten amendments to the Constitution, adopted, as they were, soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights, the government would

assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as part of one and the same principle.' And in *Gardner* v. *Newburg*, 2 John. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to everyone. If in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, *it prevents the public from loading upon one individual more than his just share of the burden of government*, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, *in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses.* And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in *Bond* v. *United States*, 116 U. S. 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This

can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.* Their motto should be *obsta principiis.*"

Again, at page 336:

"Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation."

The taking for public purposes need not be direct.

In *United States* v. *Lynah, supra,* it was held that land overflowed by water which had backed up from a Government dam was "taken" within the meaning of the Fifth Amendment, and, in *United States* v. *Welch, supra,* the same rule was held to apply to a *private right-of-way* which had been overflowed.

In *Pumpelly* v. *Green Bay Co., supra,* at page 179, Mr. Justice Miller said:

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and

that under the constitutional provisions it is not necessary that the land should be absolutely taken."

It is a taking of property within the constitutional prohibition to appropriate private pipe lines such as are here under consideration, to a public use.

IV. The only pertinent qualifications of the rules laid down in the last foregoing cases are those expressed in the well known elevator and stock yard cases: *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Ratcliffe* v. *Stock Yards*, 74 Kansas 1. It is true that these cases all relate to alleged violations of the Fourteenth Amendment to the Federal Constitution by acts passed by State legislatures; but the principles involved are entirely applicable to the passage of any similar statute by Congress.

The principle upon which all these cases rest is laid down in *Munn* v. *Illinois*, *supra*, at page 126, and the same language is repeated over and over again, not merely in the Federal cases, but in a long line of State decisions, many of which are referred to in the opinion of the U. S. Supreme Court in *Budd* v. *New York*, *supra*. This language is as follows (italics partly mine):

> "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that, when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law

> Tracts 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. *When, therefore, one devotes his property to a use in which the public has an interest,* he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

It appears from the further discussion in the opinion in *Munn* v. *Illinois* and in the opinions in the other cases cited above, as well as in the State cases referred to, that, by the words "use in which the public has an interest," the courts mean the use of the property in question for the service of the public, or at least for a section thereof. In no reported case, so far as I am aware, has the doctrine of *Munn* v. *Illinois* been applied unless the property has, at the time when the suit was brought, been actually in such use.

In *Brass* v. *North Dakota, supra,* the Court was considering an Act of the Legislature of the State of North Dakota, which provided in part as follows:

> "All buildings, elevators, or warehouses in this state, erected and operated, or which may hereafter be erected and operated, by any person or persons, association, co-partnership, corporation or trust, for the purpose of buying, selling, storing, shipping or handling grain for profit, are hereby declared to be public warehouses, etc."

Referring to this statute, Mr. Justice Shiras, at page 404, says:

> "We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit."

The language of the North Dakota statute above quoted is very similar to that of Section 7 of the Interstate Commerce Act quoted above, and the language quoted from the opinion would seem to be a strong authority in support of the contention that the Interstate Commerce Act does not cover private pipe lines.

So in *Munn* v. *Illinois*, at p. 133, Mr. Chief Justice Waite said (italics mine):

> "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations *if they use it in this particular manner.*"

Quite recently the United States Supreme Court has held that private wharves on navigable streams cannot be taken without compensation, and that to compel the owners thereof to allow the wharves to be used by others would be to take property without due process of law. In this connection, the court distinguishes *Munn* v. *Illinois*.

Weems Steamboat Co. v. *People's Co.*, 214 U. S. 345.

In the case last cited, at pages 355-7, Mr. Justice Peckham said (italics mine):

"A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law, and if necessary that it or any part of it be taken for the public use, due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while at the same time denying its use by anyone else.

The case of *Munn* v. *Illinois*, 94 U. S. 113, 127, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. *Their property was being used with their consent by and its use devoted to the public to any extent desired, and the only question was in regard to the compensation which they were entitled to ask for the business thus done.* The complaint was that the charges were too great and were a violation of a law of the State and were not reasonable, and the answer made by the owners of the property was that it was their private property, and they had the right to charge what they pleased. *The court said, as you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use,* and the right, on the part of the State, to regulate charges which you shall make, to the end that they shall be just and reasonable. *If the owner of one of these wharves had devoted it to the public use and permitted the public to use it as it desired, and demanded compensation for such*

use, the question as to the amount of such compensation might be raised as in the Munn class of cases to be determined with reference to the reasonableness of the charge. But this is no such case. The legislature has passed no law regarding rates, if that were material, and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including defendant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensation therefor, because there is no other wharf at the place, or because it would be more convenient to such third person to so use it or *because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use.* There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held."

A private pipe line, built by a business corporation and operated for the transportation of its own oil, so far as the rights of its owner are concerned, differs in no respect from a private wharf such as was under consideration in the case last cited.

V. The Act contains no definition of the words "common carrier," except that they shall include express companies and sleeping car companies. Whether a pipe line company in 1910 was in fact a common carrier or not must, therefore, be determined by the common law definition of those words.

Judson on Interstate Commerce, 2d Edition, p. 220, says:

"The application of the provisions of the Act to pipe lines was made by the amendment of 1906. Owners of pipe lines had been held to

be common carriers when doing business for the public as such. *Griffin* v. *Pipe Lines*, 172 Pa. 580. * * * As to the owners of pipe lines who are not common carriers, and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the Act. * * * The Act does not define what will necessarily constitute a person or a corporation a common carrier, nor does it empower the Commission to lay down the tests. It follows that the expression 'common carriers' used by Congress means those carriers which are common carriers at common law, and which have complied with such requirements as may have been imposed by constitutional or legislative authority."

The Commission has also so held, at least as to railroads.

In *Manufacturers' Railway Co.* v. *St. L., I. M. & S. Railway Co.*, 21 I. C. C. R. 304 (1911), Mr. Commissioner Clements said, at page 312 (italics mine):

"*The Act to Regulate Commerce, limiting its application, as it does, to common carriers, was passed in full view and recognition of the common law under which the attitude and actions of the person, whether natural or artificial, determines whether or not he or it is in law a common carrier.* Speaking in general terms, a carrier could become a common carrier by offering its services as such to the public upon first complying with the statutory or police requirement demanded of it by charter or otherwise. *The test to be applied in determining whether a person is a common carrier really is whether he holds out, either expressly or by a course of conduct, that he will, so long as he has room, carry for hire the goods of every person* indifferently who will bring goods to him to be carried. *Nugent* v. *Smith*, 1 C. P. Division 19, 27. With respect

to the transportation of persons and property by rail, the act to regulate commerce has not undertaken to specify in terms what shall, for the purpose of that statute, be considered to be a common carrier, but has proceeded upon the foundation of the common law as to public callings. It is not therefore within the authority of the Commission to pronounce any carrier by rail not to be in fact or in law a common carrier, if, by the tests and principles of the common law, coupled with such requirements as may have been imposed by constitutional or legislative authority, it would be held to be such."

At common law, the words "common carrier" were limited to one who undertook or held himself out to carry for all persons who wished to engage him.

1. Such is the law in England.

In *Ingate* v. *Christie*, 3 Car. & K. 61 (1850), which is a leading case, Baron Alderson said:

"Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but, if he does not do it for everyone, but carries for you and me only, that is a matter of special contract."

Gisbourn v. *Hurst*, 1 Salk. 249, defines a common carrier as

"any man undertaking for hire to carry the goods of all persons indifferently."

In *Nugent* v. *Smith, L. R.*, 1 C. P. 19, at p. 27, Bretf, J., said:

> "The real test whether a man is a common carrier, whether by land or water, therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that, he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried."

2. In the United States the test is practically the same as in England.

In *Jackson Architectural Iron Works* v. *Hurlbut*, 158 N. Y. 34, Judge O'Brien defines a common carrier at page 38 as follows:

> "A common carrier is one who, by virtue of his calling, undertakes for compensation to transport personal property from one place to another for all such as may choose to employ him, and everyone who undertakes to carry for compensation the goods of all persons indifferently is, as to liability, to be deemed a common carrier."

In *Allen* v. *Sackrider*, 37 N. Y. 341, the Court of Appeals said, at page 342:

> "The employment of a common carrier is a public one, and he assumes a public duty and is bound to receive and carry the goods of anyone who offers. 'On the whole,' says Professor Parsons, 'it seems to be clear that no one can be

considered as a common carrier unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him."

Mr. Moore, in his work on Carriers, says, at page 20:

"According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for anyone in the course of his employment and for a reasonable and customary price, he would be liable to an action."

This definition was quoted with approval by the Circuit Court of Appeals in the Second Circuit, in *The Wildenfels*, 161 Fed. 864.

In *United States* v. *Sioux City Stock Yards*, 162 Fed. 556, a common carrier of personal property is defined to be

"one who undertakes for hire to transport from place to place the goods of others who may choose to employ him for that purpose."

3. Obviously, The Uncle Sam Oil Company does not come even remotely under any of the definitions of a "common carrier" thus laid down.

Second: Companies organized under business corporation laws, and which profess to do and are actually doing only a private business, even if it be a transportation business, are not subject to regulation under the Interstate Commerce Act. Such companies lack the essential characteristics of a holding out to the public for general services.

1. It has been held in numerous cases that industrial railroads, built for the transaction of private business, are not subject to liability as common carriers.

Wade v. *Lutcher & M. Lumber Co.*, 74 Fed. 517 (C. C. A., 5th Circuit, 1896).

E. E. Taenzer & Co. v. *C., R. I. & P. Ry. Co.*, 170 Fed. 240, 248, 249 (C. C. A., 6th Circuit, 1909).

Weidenfeld v. *Sugar Run R. R. Co.*, 48 Fed. 615, 617, 618.

McKivergan v. *Lumber Co.*, 124 Wis. 60.

In *Wade* v. *Lumber Co.*, *supra*, at page 521, the Circuit Court of Appeals for the Fifth Circuit said:

> "But for the earnestness with which the argument was presented in this court, we would not suppose that the learned counsel would seriously contend that Article 244 of the State Constitution, dealing with corporations of public improvement and public utility, was intended to or could be so construed as to make out of a logging railroad appurtenant to a sawmill, constructed wholly on private ground and operated for private purposes, a common carrier, charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold

that a railroad on a sugar plantation, appurtenant to the sugar mill and used for carrying the cane thereto, should be declared a common carrier. The Supreme Court of the State of Louisiana, while not squarely deciding the matter in hand, has decided that a corporation organized to carry freight and passengers between two sugar plantations about five miles distant from one another, and which, it was charged, was not a corporation organized for public purposes, but was a combination of individuals, whose sole object was to foster private ends of two certain persons named, who owned jointly two sugar plantations and who wished to transport the sugar cane grown on one of the plantations to the refinery situated on the other, was not *ex necessitate* such a corporation for public improvement as would authorize the appropriation of private property for its purposes. *Williams* v. *Judge of the Eighteenth Judicial Court*, 45 La. Ann. 1295, 14 South. 57. The proposition that an individual may build a railroad wholly on its own land, for its own business without making the same a common carrier, we do not doubt."

In *Taenzer & Co.* v. *Chicago, R. I. & P. R'way Co.*, *supra*, the Circuit Court of Appeals for the Sixth Circuit held that a spur railway line built by a lumber company on its own land, forming a connecting line between a railroad and its mill, some miles distant, for the purpose of transporting its own products to the railroad for shipment, and which neither did nor held itself out to do carrying for the public, was not a common carrier. The court said, at pages 248-9:

"The chief arguments adduced in favor of the proposition that the so-called St. Francis River Railroad is a common carrier are that

the term 'railroad,' as contained in the name under which the road was operated, imports the status of common carrier; that the provisions in the contract for joint construction and maintenance of passenger and freight depot buildings and platforms (including joint station agent) and references therein to the lumber company's line as a 'railroad' and to its 'right-of-way'; the provisions for division of freight rates, as between two connecting carriers, and the including in the agreement for rates and division thereof, shipments of cotton and merchandise, are consistent only with the status of the St. Francis River Railroad as a common carrier. But these considerations cannot outweigh the substantial considerations shown, not only by the contract, but by the conditions and circumstances under which it is shown to have been made. They cannot overcome the fact which clearly stands out, according to the proofs given or offered, that the so-called railroad was intended, both by the railroad company and the lumber company, merely as a spur to the mill, for the purpose of enabling the lumber company, not as a carrier, but as a shipper, to transport its forest products over the line of the Choctaw road; that throughout the lumber company's relation to the railroad company was in fact that of shipper—a relation emphasized by the requirement that the lumber company ship 'its products over the Choctaw railroad, unless transported by river.' The terms used and the provisions relied upon as establishing the status of common carrier cannot prevail against the considerations that this lumber and logging road had no rolling stock suitable for any purpose except logging; that there was in the neighborhood no cotton or other merchandise to ship, and no inhabitants to serve as carrier, either in the relation of passengers, shippers or consignees; and that there was no holding out of the road as such carrier by advertisement or otherwise.

** * * A private railroad, established as an incident to a private business, is not a common carrier."*

II. The same view is expressed concerning pipe lines under the Interstate Commerce Act, by Judson on Interstate Commerce, 2d Edition, at page 220:

> "As to the owners of pipe lines who are not common carriers, and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the Act."

Third: Even companies organized under transportation laws which grant the right of eminent domain and common carrier franchises and impose public duties are not necessarily common carriers within the meaning of the Interstate Commerce Act unless actually operating as such.

I. From the point of view of the State granting a charter which confers the right of eminent domain and common carrier franchises, or otherwise specifically provides for public service to be rendered under it, the acceptance by such corporation of such charter undoubtedly amounts to an undertaking by such corporation to serve all, and subjects the corporation to the duties of a common carrier.

Griffin v. *Southwest Penn. Pipe Lines*, 172 Pa. State 580.

People v. *Colorado Central Railroad Co.*, 42 Fed. 638, at p. 642.

Cincinnati, I. & W. Ry. v. *Connorsville*, 170 Ind. 316.

II. But it by no means follows that such companies are within the provisions of the Interstate Commerce Act.

The purpose of the Act should be borne in mind. Its underlying principle was to secure reasonable rates, to prevent discriminations against shippers and localities, and publicity of rates. *Interstate Commerce Com.* v. *B. & O. R. R. Co.*, 145 U. S. 263; *N. H. R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361. From this point of view it is concerned only with those carriers which *are actually serving* two or more possible competitors or the public generally.

This view has been accepted by the Interstate Commerce Commission itself. In *Star Grain & Lumber Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 17 I. C. C. R. 338 (1909), Mr. Commissioner Harlan said, at page 344 (italics mine):

> "It is sometimes said that the essential characteristic of a common carrier is that it holds itself out as such to the world, and, in a certain class of cases, some such test has been applied; and where there is a shipping world to which it may hold itself out as a common carrier and which it may serve in that capacity, the test suggested may be a proper one. But when we are dealing with a law, the underlying principle of which is to forbid preferences, discriminations and concessions from the legal rates, and when there is no shipping public which the alleged common carrier may serve, and when it is owned or controlled directly or indirectly by a particular industry which needs it as a plant facility and cannot successfully conduct its business without it, and when its revenues accrue directly or indirectly to that industry—it leaves this Commission in rather an impotent condition if it must accept the mere

form as controlling, and may not look into the actual situation and thus be able to enforce the prohibitions of the Act against such preferences and discriminations and departures from lawfully published rates. Some such state of facts was developed in *Taenzer & Co.* v. *C., R. I. & P. Ry. Co.*, 170 Fed. Rep. 240. Shortly before that proceeding was commenced *the logging road in behalf of which the case was instituted was incorporated as a common carrier*, so that it stood before the court with all the outward form of a common carrier possessed by the great majority of the so-called tap lines that are now before us on this record. * * * Upon these facts the court had no difficulty in holding that the tap line 'was not a common carrier'."

The Commissioner continued, at page 352:

"The difficulty of determining where the private carrier leaves off and where the common carrier begins is what lends embarrassment to the problem before us. Manifestly, a lumber company cannot endue its railroad with the habiliments of a common carrier by taking out an act of incorporation, nor by the filing of a tariff, nor by the making of a statistical report to this Commission. The fact that the Legislature of the state has granted an act of incorporation with the right of eminent domain, especially if that right has been exercised in the construction of the road, would be significant; *but, after all, it is in each case a question of fact, depending upon the circumstances under which the individual road has been constructed and is being operated*."

See, also, *Weidenfeld* v. *Sugar Run R. R. Co.*, 48 Fed. 615, 617-18.

There is, therefore, a clear distinction between the powers of the State which creates such a cor-

poration and the powers of the Interstate Commerce Commission as limited by this Act. In its relation to the State the corporation is clothed with a public interest and subject to regulation, because its charter so provides. If it refuses to perform the duties which it has undertaken its charter may be enforced or revoked, or other penalty imposed. But the Interstate Commerce Commission is given no such power. It has jurisdiction *only if the corporation is actually doing the business of a common carrier in interstate commerce.* It then regulates and controls such business; but it has no power to enforce the charter undertakings of a corporation, or to compel it to act as a common carrier if it is not doing so.

Fourth: The transactions of appellee are interstate transactions, but are not interstate commerce, as they do not constitute or involve any dealings beween appellee and another. The Constitution does not give the Congress authority to regulate interstate transactions which do not amount to commerce and if the act should be construed to apply to the transactions of appellee it would be unconstitutional.

The fact that appellee produces and pumps its oil through its 3-inch pipe line from its oil wells in Oklahoma to its refinery in Kansas, does not show that it is engaged in the transportation of oil in *interstate commerce.* All acts performed by its employees are performed by it—their acts are its acts, and hence there is no dealing between appellee and another. Congress is granted the power to regulate interstate *commerce.* That does not include the

power to regulate interstate transactions *which do not amount to commerce.* The word *commerce* is a well-known term. It is absurd to say that a transaction which involves no dealing with others is commerce. Commerce means dealing between two or more persons, and there is no commerce or dealing between The Uncle Sam Oil Company and any other person, in the transaction by which it produces the oil at the wells in Oklahoma and transports it through its 3-inch pipe line from the oil wells in Oklahoma to its refinery at Cherryvale, Kansas. This transaction is one entirely within the company. No other person is concerned with it, and there is no semblance of commerce in it. The transaction is precisely the same as the transaction of a farmer who owns land crossed by the state line between Oklahoma and Kansas and who drills an oil well on his own land in Oklahoma and pipes his oil across the state line to his tank on his own land in Kansas. It would be absurd to say that he is a common carrier and that by such transaction he is engaged in interstate *commerce* and could be compelled to transport oil for the public through his line, or else to cease piping his own oil, nor would the fact that his pipe line crossed the public highway make him a common carrier.

In construing the law and in ascertaining its true meaning we should constantly bear in mind that not only the President, but each member of the Congress, has taken an oath to *support* the Constitution, and that they never intended to violate that oath by passing a law which would *violate* the Constitution. The Constitution is a compact between the people as a whole on the one part and each individual on the

other part, and it is supreme. Whenever any law is in conflict with the Constitution the law is void. The Constitution does not give the Congress the power to regulate interstate transactions of an individual or corporation which consist of transporting a commodity from a point in one state to a point in another state and delivering the commodity to itself, for there is no *dealing* in the transaction. It does not amount to commerce. Interstate *commerce* is all that Congress can regulate.

Constitution, Article 1, Section 8.

8 Federal Statute An., page 363, and cases there cited.

Commerce is defined by Webster's Universal Dictionary as follows:

"1st. In a general sense, an interchange of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale, trade, traffic. 2d. Intercourse between individuals, interchange of work, business, civilities, or amusements; mutual dealings in common life. The word is synonymous with barter, business, communication, dealing, exchange, intercourse, trade, traffic."

"Commerce among the states consists of *intercourse and traffic between their citizens.*"

Gloucester Ferry Co. v. *Penn.*, 114 U. S. 203.

Addyston Pipe, etc., Co. v. *U. S.*, 175 U. S. 241.

"*Intercourse*" and "*traffic*" "*between*" citizens. There is no intercourse or traffic between citizens in the transactions of The Uncle Sam Oil Company

whereby it transports its own oil through its three-inch pipe line from its oil wells near Bartlesville, Oklahoma, to its own refinery at Cherryvale, Kansas. It is purely a private transaction of the Company in which no one else is interested or participates and it does not amount to intercourse or traffic between the Company and any other person; therefore it does not amount to commerce and cannot be regulated by Congress without an amendment of the Constitution.

The Uncle Sam Oil Company has the legal and constitutional right to transport its oil through its own pipe line from its oil wells near Bartlesville, Oklahoma, to its refinery at Cherryvale without any interference by others. It has the *right to refuse to transport oil* through its pipe line for others. This *right to refuse* to work for others and *furnish the use of its property to others* is *property* within the meaning of the Constitution, and it cannot be taken from the Company by Congress without due process of law.

Constitution, 5th Amendment.

The Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument.

U. S. v. *Germaine*, 99 U. S. 510, 9 Federal Statutes An. 219.

Mr. Webster, in *Dartmouth College* v. *Woodward*, 4th Wheat. (U. S.) 518, defined due process of law thus:

"By the law of the land, which is but another expression for due process of law, is most clearly indicated the general law—a law which

hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the Legislature. There would be no general permanent law for courts to administer or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or to administer the justice of the country."

10 Am. & English Ency. of Law, 2d Edition 293, and cases there cited.

Justice Johnson, in the case of *Columbia Bank* v. *Okely*, 4 Wheaton (U. S.) 235, defines the clause due process of law, as being intended to secure the individual from the *arbitrary* exercise of the power of government *unrestrained by the established principles of private right* and distributive justice.

Hoover v. *McChestney*, 81 Federal Reports, 48.

Meyers v. *Shields*, 61 Federal Reports 718.

If it is true that Congress has no power to regulate a private transaction which possesses none of

the elements of commerce, then, of course, the rule of reason would interpret the law to read that the Act should apply only to persons engaged in the transportation of oil *for others*. That is evidently what Congress intended, for the entire Act is taken up with regulations of the conduct of the transportation company with those employing it to transport and handle their commodities.

A common carrier is one who undertakes, for hire or reward, to transport from place to place the goods of those who choose to employ him, and his duties and liabilities are well settled in the law. See Am. & English Ency., 2d Edition, 237, 245.

Under the common law and where there is no special contract affecting the rights and duties of the parties, a common carrier is liable absolutely and at all events for a failure to deliver the property intrusted to its safety to the consignee or owner. Its liability is not limited to losses which are the result of its negligence, but extends to any loss however caused, excepting only those losses or injuries caused by an act of God, or the public enemy, or through the shipper's negligence.

6 American & English Ency. of Law 262, 263, and cases there cited.

How is it possible for any law-abiding citizen to contend that The Uncle Sam Oil Company shall be compelled to receive and transport through its 3-inch pipe line all the oils which others may offer, and that it shall be compelled to take said oil and assume the absolute liability of delivering it to the consignee or owner, notwithstanding the transportation of this

oil for others would suspend the operation of its refinery for lack of ability to transport its own oil to its refinery? How can it be claimed that this liability and injury could be forced upon The Uncle Sam Oil Company when it has never offered to transport any oil for any person and has never transported oil for any person? If the duties and obligations of a common carrier can be imposed upon The Uncle Sam Oil Company under these conditions, then they can be imposed upon every farmer in the United States who hauls his grain and products from his farm to market. The public highways are for the use of the public. The Uncle Sam Oil Company is a part of the public and it has as much right to use the public highway to transport its oil in a pipe line as it would have to transport its oil in a wagon drawn by oxen.

State v. *Kansas Natural Gas Co.*, 80 Pac. 962, 71 Kan. 508, 114 Am. State Rep. 507.

La Harpe v. *Gas Co.*, 69 Kan. 97, 76 Pac. 448.

McCann v. *Telephone Co.*, 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171.

It would be absurd to claim that because it transports its oil over the public highway in a tank wagon drawn by an ox team, that it therefore became a common carrier of oil and was obliged to carry all the oil offered it, and insure the safe delivery of such oil under all circumstances. I realize that this is an age in which many innovations are proposed. I am expecting to see some candidate for the presidency propose an amendment to the multiplication table, a repeal of the Ten Commandments and of the law of

gravitation, but if the Constitution is to be of any validity or value to the plain common people, no such proceeding as declaring The Uncle Sam Oil Company a common carrier, and burdening it with the duties and obligations of a common carrier, to the injury of its own business, will be countenanced by this Court. The only argument in favor of such outrage is the plea that someone else may have oil to transport and no pipe line in which to transport it. With equal force our refineries could be declared common refineries; our tank cars common tank cars; our distributing stations common distributing stations, and our tank wagons common tank wagons, and all turned over to the use of those who had oil to refine, transport and distribute, but no refineries, tank cars, distributing stations or tank wagons. If that plea should warrant the confiscation of our property and the injury of our business, which would be caused by compelling us to assume the duties and obligations of a common carrier, then the same rule would make a common carrier out of the farmer who owns a team and transports his farm products from his farm to market, provided there should be another farmer who had products to transport, but no team.

Appellants lay much stress upon the debates in Congress and the reports of departmental agents showing a desire on the part of a large element of the people to have oil pipe line companies declared common carriers. Senators and Congressmen and Departmental Agents may come and go, as many of them have, but the Constitution remains. It cannot be violated if our liberties are to be preserved. Even if all of the Senators, Congressmen and Departmental Agents were in favor of violating the Constitution

their acts to that end would be void. The court would be bound to declare the truth and the truth would make their acts of no effect. The position of appellants that the intention of Congress should prevail amounts to an argument in favor of rendering the Constitution of no force or effect. If the Constitution can be changed at the will of Congress, then the Constitution is a mere dream which can be dissipated by any act of Congress and we would be substituting a government by men instead of our present government by written law. The Constitution provides how it may be changed by amendment. The people have a right to change the Constitution by amendment, but even all of the people have no right to take our property without compensation so long as the Constitution remains in its present form.

Congress recognized the law which classifies carriers into two classes, common carriers and those not common, and it has undertaken to place the burden of common carriers upon every pipe line company which carries any oil *for others* from one state to another. Evidently this is undertaken by the Congress for the purpose of preventing the owner of such pipe-line from discriminating in favor of certain favored shippers, and I am not contending that Congress does not have the power to do this. It seems but fair to require a company which transports oil from one state to another for one person to also transport the same kind of oil for others at the same rate and under the same terms and conditions. This may be undertaken by the Act in question. When a company transports oil from one state to another for one person, even under a special contract, the transportation is interstate commerce, and the Congress

may have the constitutional right to say to the transporting company: "If you engage in such interstate commerce with one person you must also do likewise with others." This seems just. But where the transaction of the company is a mere transporting of its own oil from one point to another to itself, and *there is no dealing with another involved*, it is not *commerce*. It is not interstate commerce, and the Congress cannot, *on account of such transaction*, burden the company with the obligations and duties of a common carrier. The fact that The Uncle Sam Oil Company intends to refine and sell its oil after it reaches Cherryvale cannot make transportation of it from its wells near Bartlesville to its refinery at Cherryvale, interstate commerce. If that was the law, then if a farmer in one state *intended* to haul his products to a market across the state line and sell them there, his intentions to sell at that market would make his work of raising and hauling the crop interstate commerce. The law must be uniform and bear upon all alike. If the work of the farmer in raising and hauling his crop to market would not be interstate commerce until he should *actually sell and agree to deliver his product to another* across the state line, it is clear that the same rule would not make the transportation by The Uncle Sam Oil Company of its oil from its oil wells in Oklahoma to itself in Kansas, interstate commerce. It would not be interstate commerce unless the company had sold its oil in Oklahoma and agreed to deliver it in Kansas. This it has never done.

If The Uncle Sam Oil Company can be declared a common carrier, its rich and powerful competitor could easily manage to have oil enough tendered for

shipment to equal the capacity of the line and thereby prevent The Uncle Sam Oil Company from transporting to its refinery any of its own oil, and in this manner it could close a competing refinery. This is not in the interest of competition. It is not for the best interest of the people. I submit that the best interests of the people will best be subserved by strict adherence to the Constitution. It has protected the people by preserving their rights these many years, and it should not be violated in this instance. It is easy to start a conflagration, but not so easy sometimes to put it out. It may seem easy to pile these illegal burdens upon The Uncle Sam Oil Company, but if the Constitution can be violated in this instance, who will say it may not be violated in every other instance, and whose rights will be safe? This should be, as it was intended, a government of law, not of men, and until the Constitution is legally amended, so as to authorize Congress to provide that everyone owning a pipe line shall be a common carrier, whether he offers to carry for the public or not, it should be held that there is no law making the Uncle Sam Oil Company a common carrier under the circumstances set forth.

Fifth: The laws of the State of Kansas and the State of Oklahoma, undertaking to make the owners of pipe lines, under certain conditions, common carriers, do not have that effect as to appellee.

For the reasons set forth herein, no state has the power to convert the owner of a private pipe line into a common carrier without the consent of the owner, unless the owner has held himself out as will-

ing to assume the duties and liabilities of a common carrier. In other words, *unless the pipe line owner dedicates his property to the use of the public.* This has never been done by the appellee, and from the authority cited in this brief the states are without any power or authority to decree by legislative enactment the appellee to be a common carrier and to impose upon it the duties and obligations of a common carrier by legislative enactment without its consent.

As stated in the petition, the pipe line of appellee extends from Bartlesville to Cherryvale, *both points being within the oil field and the market price of the crude oil being the same at each end of the line.* This fact makes it clearly improbable that any owner of crude oil would desire to have it transported through the pipe line of appellee. Such crude oil owner could get for his crude oil the same price before shipping as he could get after the shipment was made and he would lose the cost of transportation by the operation. No owner of crude oil has yet been discovered who is so lacking in business acumen as to be willing to pay appellee for transporting the oil sixty miles when he could secure the same market price without making the shipment. *This fact accounts for the fact that since the pipe line of appellee was constructed in 1906 no person has tendered any oil for shipment.*

The law in Oklahoma referred to in the answers was passed after said pipe line was laid and in operation in accordance with the rights granted by Congress and the Territory of Oklahoma. It clearly refers and applies to common carriers, but does not apply to the pipe line of appellee.

Sixth: The public policy of the United States or of any state therein cannot be created in violation of the Constitution.

The answers and briefs of appellants are largely devoted to statements attempting to show the court that a law which would require a pipe line to be a common carrier might be beneficial to a certain class of people, and that it is practical for a pipe line to accept a certain grade of oil from the shipper and deliver a like quantity of a like grade of oil at the place of destination. Counsel for appellants may be correct in these conclusions, but I apprehend that this Court will not undertake to enter upon the creation of such legislation when Congress has not even attempted it. Congress has not undertaken to say in terms that appellee must build storage tanks for the various grades of oil and must receive the various grades of oil and trade therefor the same amount and grade of oil at the place of destination plus a reasonable charge for the services. It is left for the ingenuity of counsel to suggest that appellee might engage in the business of a warehouseman and trade oil with the public. The duty of a common carrier is to deliver the identical property tendered for shipment to the consignee or owner at the place of destination. It may be argued that grain is exchanged in the course of shipment. If this occurs it occurs by contract and the contract makes the carrier, so far as the exchange is concerned, a warehouseman. Congress has not undertaken to declare pipe line companies warehousemen. Counsel for respondent surely cannot go to the extent of claiming that Congress by the Act declared or undertook to declare

that pipe lines companies are warehousemen. And even had it so intended to declare the public policy, it could not so violate the Constitution.

Seventh: Appellee has no power to construct or operate a pipe line as a common carrier.

By reference to the laws of Arizona at the date of its incorporation, I think the Court must find and hold that appellee was organized as a private mining and manufacturing company. Section 21 of the Corporation Laws of Arizona at the date of the incorporation of appellee provides that "No corporation organized under the provisions of this Act for the purpose of doing a mining or manufacturing business shall have the power to construct or operate any railroad, tramway, turnpike or canal, except such as may lead from its principal works or place of business to some navigable stream or to some existing railroad, turnpike or public highway."

While the word pipe line is not used in said section, yet the fair intent of the Legislature clearly appears to be to withhold from any company organized for mining and manufacturing purposes the power to construct or operate any means for the transportation of persons or property as a common carrier. The Legislature provides for the organization, operation and control of railroads and other common carriers by separate enactments. It seems to me there can be no question but that under the law of its organization appellee is a private mining and manufacturing company and that the power and authority to act as a common carrier was withheld from it.

Eighth: The acceptance of a right-of-way from the Interior Department does not make the appellee a common carrier.

The answers of the United States and of the Interstate Commerce Commission both state that appellee made application for a right-of-way over Indian lands subsequent to December 21, 1906. They distinctly state that the application was made under the rules and regulations of the Interior Department, dated December 21, 1906, and that appellee in its application for said right-of-way and in accepting the same agreed that the pipe line should be a common carrier and that said application was approved by the Secretary of the Interior after December 21, 1906, and under said rules which required the applicant for right-of-way to agree that the pipe line to be laid should be a common carrier. These positive statements in the answers are sworn to by the persons who verified the answers. I do not question the sincerity and honesty of purpose of the persons who verified the answers. I am informed by an attorney for the Interstate Commerce Commission that this false information was furnished by some person in the Interior Department and I believe that someone in the Interior Department deliberately deceived counsel for the United States and for the Interstate Commerce Commission and the Honorable Charles A. Prouty, the Commissioner who verified the answer of the Interstate Commerce Commission, and misled them to believe that the records showed that the application for the right-of-way for this pipe line had been made subsequent to December 21, 1906, and that appellee made the application under said rules and

regulations of December 21, 1906, and agreed that the pipe line should be a common carrier. The record discloses the falsity of such statement and the desperation to which the Interior Department seems to be driven in its opposition to appellee. The extortionate demand by the railroad company, which had upon its board of directors the late H. H. Rogers, managing officer of the Standard Oil Company forced appellee to build this pipe line to move its oil from its wells to its refinery to avoid paying said railroad more than the market value of the oil for transporting it sixty miles in appellee's own tank cars. Now the Interior Department furnishes the Interstate Commerce Commission the false statement that said pipe line was laid upon right of way obtained by an agreement that it should be a common carrier, to induce the Interstate Commerce Commission to take that position and the Honorable Charles A. Prouty and the Honorable Blackburn Esterline to swear that such misstatement is the truth. On this decree of the Interstate Commerce Commission, based upon this false information furnished by the Interior Department, the Interior Department has refused to approve any lease for oil or gas purposes made by the Indians to appellee and stated to Congressmen, Senators and the public generally that it disapproved the lease because the Interstate Commerce Commission had declared appellee a common carrier. The Interior Department in this matter stands in no enviable position. It is no excuse to say that the statement was made because a map was returned to the Department January 1, 1907, and approved January 23, 1907. The record shows that this map was in the Department prior to December 5, 1906, and

that the application for the right-of-way was made in February and approved in March, 1906; that this map, which is but a picture of the right-of-way applied for and granted on March 26, 1906, was merely completed by attaching thereto the surveyor's notes to make it more plain and clear; that said map did not change the right-of-way, and that in approving said map the then First Assistant Secretary if the Interior, the Honorable Thos. Ryan, distinctly stated that the application for the right-of-way had been approved March 26, 1906. The record shows that the pipe line was completed and in full operation November 16, 1906, and the completion of the map could not change the rights of the Company to the right-of-way for said pipe line any more than a photograph of the line could do so. There is nothing on record showing that the appellee ever knew of the rules of December 21, 1906, and affidavits from its officers prove that it had no knowledge or notice of such rules. Under these conditions there could be no estoppel of the appellee to claim that said pipe line is not a common carrier.

The rules and regulations of the Interior Department, dated December 21, 1906, requiring applicants for right-of-way to agree that the pipe line should be a common carrier, were repealed by the Interior Department June 10, 1909, and even if said rules had been legal and authorized by Congress, the repeal would relieve appellee from complying with their terms. But the provisions of the rules of December 21, 1906, which require applicants for right-of-way for pipe lines over Indian lands to agree that such pipe lines shall be common carriers, are not authorized by law. They are a usurpation of author-

ity by the Interior Department and were an attempt on the part of the then Secretary of the Interior to enact a law on the subject when Congress, the law-making body, had not done so. The law under which said rules were made was the Act of March 11, 1904, entitled "An Act authorizing the Secretary of the Interior to grant right-of-way for pipe lines through Indian lands." The Act gives the Secretary of the Interior authority to determine the compensation to be paid the Indians for the right of way. That is the extent of his authority as to imposing terms for the right-of-way granted. It gives no authority to the Secretary of the Interior to manage the operation of the pipe line. Any attempt of the Secretary of the Interior to conduct or manage the pipe line would be a usurpation of authority, and any rule made by him, not authorized by law and not incidental to carrying out the provisions of the law, are void, notwithstanding parties dealing with the Department have been compelled to incorporate such void rules and requirements into a written contract.

U. S. v. *McMurray*, 181 Fed. 723.

See also:

Garfield v. *U. S.*, 211 U. S. 249, 29 S. Ct. 62, 53 U. S. (L. ed.) 168, affirming 30 App. Ca'es 177.

In the above case of *U. S.* v. *McMurray*, regulations by the Secretary of the Interior which require lessees of coal and asphalt lands to mine on each lease 3,000 tons the first year, 4,000 tons the second, 7,000 tons the third, 8,000 tons the fourth and 15,000 tons the fifth and each succeeding year or pay the

royalties on such quantity if not mined, and prescribing that a failure to do so would subject the lease to cancellation, were held to be void. There is some slight excuse for the Secretary to make these requirements as to the quantity of coal to be mined, because it might be thought to be incidental to his authority conferred by Congress, but there is no reason upon which to base the action of the Secretary of the Interior undertaking to force applicants for the right-of-way authorized by Congress to accept the burdens, duties and obligations of a common carrier.

In the case of *Midland Oil Company, et al.*, v. *Susan Turner, et al.*, decided by the Circuit Court of Appeals April 11, 1910, 179 Fed. 74, the question of the Secretary's power to change by rule or regulation the terms of an existing lease was involved and the power denied. The lease was made under rules and regulations prescribed by the Secretary of the Interior and subject to his approval. It provided that it should not be assigned without the written consent of the lessor. Subsequently new rules were promulgated providing for assignment of such leases upon the consent of the Secretary of the Interior. The assignment of the lease was made without the consent of the lessor, but with the consent of the Secretary of the Interior. The assignment was held to be void.

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."
>
> *Morrill* v. *Jones*, 106 U. S. 466, 1 Supreme Court 423, 27 L. ed. 267."

The acceptance of such terms under such conditions would not be valid and binding upon appellee. And in event that it should be held to be a valid rule, it has never been complied with, and the real test as to whether appellee is a common carrier must be determined by the manner of operating said pipe line.

The record shows that appellee was forced by extortionate freight rates to build this line; that the line extends from one point to another wholly within the oil field; that the price of crude oil has remained the same at both ends of this line; that during the six years it has operated the line solely in the movement of its own oil from the wells to its refineries, no person has tendered any oil for shipment; that there is no element of commerce in the operation of said pipe line; that the Interstate Commerce Commission by said order is seeking to compel appellee to become a common carrier and to assume all of the duties and liabilities not only of a common carrier but of a warehouseman in violation of its rights under the Constitution, and that said Commission will carry out said order and violate the rights of appellee unless it is enjoined. Therefore the temporary injunction asked for should have been granted, and there is no error in the decision of the lower court granting the protection due appellee under the Constitution.

Respectfully submitted,

ALBERT L. WILSON,
Solicitor for Appellee.

[fol. 889] EXHIBIT "C" TO THE PETITION FOR REHEARING

The Pipe Line Cases

Nos. 481, 482, 483, 506, 507, and 508

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1913

THE UNITED STATES, et al., Appellants,

v.

THE OHIO OIL CO.

THE UNITED STATES, et al., Appellants,

v.

STANDARD OIL CO.

THE UNITED STATES, et al., Appellants,

v.

STANDARD OIL CO. OF LOUISIANA

THE UNITED STATES, et al., Appellants,

v.

THE PRAIRIE OIL & GAS CO.

THE UNITED STATES, et al., Appellants,

v.

THE UNCLE SAM OIL CO.

THE UNITED STATES, et al., Appellants,

v.

ROBERT D. BENSON, et al., etc.

Appeals from the United States Commerce Court

Brief for The United States

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tation of Petroleum", (59th Cong., 1st sess., House Doc. 812).
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Purity Extract Co. v. *Lynch*, 226 U. S. 192, 201.

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[fol. 898] THE PIPE LINE CASES

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1913

No. 481

THE UNITED STATES, et al., Appellants,

v.

THE OHIO OIL CO.

No. 482

THE UNITED STATES, et al., Appellants,

v.

STANDARD OIL CO.

No. 483

THE UNITED STATES, et al., Appellants,

v.

STANDARD OIL CO. OF LOUISIANA

No. 506

THE UNITED STATES, et al., Appellants,

v.

THE PRAIRIE OIL & GAS CO.

No. 507

THE UNITED STATES, et al., Appellants,

v.

THE UNCLE SAM OIL CO.

No. 508

THE UNITED STATES, et al., Appellants,

v.

ROBERT B. BENSON et al., etc.

Appeals from the United States Commerce Court

Brief for the United States

Statement of the Case

These cases involve the construction and constitutionality of the amendment of 1906 (the so-called "Pipe Line Amend-[fol. 899] ment," Act of June 29, 1906, 34 Stat. 584) to

the first section of the Act to Regulate Commerce, which, in so far as material to this case, is as follows:

> That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this Act.

The present contentions of the Government are these:

First. The amendment of 1906 applies to all oil-carrying pipe lines engaged in interstate commerce and requires them as a condition to further continuance in that commerce to act as common carriers subject to the Interstate Commerce Commission, and this, whether they had been common carriers prior to 1906 or not. On this point the court below was with the Government.

Second. The amendment so construed is a constitutional exercise of the Federal power to regulate commerce. It is designed and reasonably calculated to prevent the monopolization of interstate commerce in oil. On this point the court below was against the Government; Judge Mack, dissenting. [fol. 900] The cases at bar in all substantial respects are identical. They are appeals from interlocutory decrees of the Commerce Court granting preliminary injunctions against an order entered by the Interstate Commerce Commission which directed these appellee pipe lines and certain others (13 in all) to file with the Commission schedules of their rates and charges for the transportation of oil as required by section 6 of the Act to Regulate Commerce. Some obeyed. The appellees herein did not obey, and brought suit in the Commerce Court for the annulment of the Commission's order. Answers were filed by the United States and the Commission; motions were made for preliminary injunctions; the cases were fully heard; and on March 11, 1913 (the Commission meanwhile having postponed and repostponed the effective date of the order), the court issued its preliminary injunction in favor of the petitioners and appellees.

The injunction was accompanied by two opinions, all of the judges adopting the Government's interpretation of the

act, but a majority (3 to 1) holding that as so construed the act was violative of the Fifth Amendment to the Constitution.

These opinions were very full. The court rested its decision upon grounds which completely ended the Government's case. As stated in the majority opinion, it found that—

> Whilst each case differs from the others in various particulars, and perhaps in respects which would be important in other connections, the fundamental ques- [fol. 901] tions here involved are common to them all and arise out of facts which are practically undisputed;

and the majority opinion concludes with the words:

> Without reference to other considerations which might justify preliminary injunctions in these cases, we have purposely placed our decision upon grounds which in effect determine the controversy, and we have done so to avoid occasion for protracted trials and to aid an early review by the court of last resort.

The Government, therefore, has appealed directly from the interlocutory decrees of the Commerce Court, since this court will examine the merits of a preliminary order where it appears that the granting of it was a decision of the whole controversy on the merits. *Int. Com. Commission et al.* v. *B. & O. R. R. Co.*, 225 U. S. 326. (See also the *Sugar Lighterage Case, U. S.* v. *B. & O. R. R. Co.*, 225 U. S. 306, 326.)

Unless otherwise stated, citations in this brief will be to Record No. 481.

The Facts

Of the industry in general it should be observed that the principal crude oil fields in the United States may be described as (1) the Appalachian field, covering parts of the States of New York, Pennsylvania, West Virginia, Kentucky, and Tennessee; (2) the Illinois, Indiana, Ohio field, covering parts of those States; (3) the Mid-continent field, covering parts of the States of Kansas and Oklahoma; and (4) the Gulf field, covering parts of the States of Louisiana [fol. 902] and Texas. There are smaller fields in the States of California, Colorado, Wyoming, Michigan, and Missouri. The last official statistics available showed the total pro-

duction of crude oil in the United States for the year 1910 as 209,556,048 barrels, of the value of $127,896,328. With few exceptions the refineries are not located in the oil fields but at marketing centers. The crude oil is transported from the fields to the various refineries by the operation of approximately 40,000 miles of pipe lines. The transportation of crude oil by pipe lines has been found so much less expensive than transportation by rail that it may be said that practically no crude oil intended for refining is now transported by rail.

The facts peculiar to the respective appellees may be summarized as follows:

No. 481. The Ohio Oil Company; an Ohio corporation, with a capital stock of $10,000,000; produces and purchases crude oil in the Illinois-Indiana-Ohio and Appalachian fields; transports the same in trunk pipe lines from those fields to Centerbridge, Pa., an unincorporated village of 100 inhabitants, where it is said to make delivery to the Standard Oil Company of New Jersey (R. 2). It has no refineries, and prior to 1906 it owned no pipe lines. For a short distance in the State of Ohio its line is laid on the right of way of the Erie Railroad Company, and for a similar distance in the State of Pennsylvania on the right of way of the Pennsylvania Railroad Company.

[fol. 903] Recently its entire capital stock of $10,000,000, with the exception of $150, was owned and controlled by the Standard Oil Company of New Jersey (221 U. S. 1, 73), which now claims to own the delivery end or section of pipe line from Centerbridge, Pa., to New York Harbor. The appellee produces, purchases, and transports crude oil, with the Standard Oil Company of New Jersey as its principal patron.

This company was a party defendant in the Standard Oil Trust prosecution, and by the decree was ordered to be severed from the parent company (221 U. S. p. 71n).

The case is here on the petition, answer, affidavits, and intervening petition of the Cornplanter Refining Company.

No. 482. Standard Oil Company; a New Jersey corporation, with a capital stock of $110,000,000, and with broad charter powers. This company is engaged chiefly in refining oil, but claims to own and operate three pipe lines affected by the order in question, which extend from Unionville, in the State of New York, through New Jersey, to

New York Harbor; from Centerbridge, in the State of Pennsylvania, through New Jersey, to New York Harbor, and from Fawn Grove, in the State of Pennsylvania, through the State of Maryland, to the city of Baltimore.

In view of what appears later with reference to the meaning and purpose of the so-called Pipe Line Amendment, the circumstances under which this appellee acquired its pipe lines are most interesting. Prior to 1906 the appellee [fol. 904] had gathered to itself a large number of subsidiary corporations. Among these were National Transit Company, with an authorized capital stock of $25,455,200, of which the Standard Oil Company of New Jersey owned $25,451,650; New York Transit Company, with an authorized capital stock of $5,000,000, all owned by the Standard Oil Company of New Jersey; Standard Oil Company of New York, with an authorized capital stock of $15,000,000, all owned by the Standard Oil Company of New Jersey. The court will recall that later these four companies were held to be parties to an illegal combination and conspiracy for the purpose of monopolizing the purchase, transportation, refining, distribution and sale of crude petroleum and its products, in violation of the Sherman Anti-trust Act; and the ownership of these stocks by the Standard Oil Company of New Jersey, with the resulting power arising therefrom, was likewise held to be illegal. *Standard Oil Co. of New Jersey et al.* v. *U. S.*, 221 U. S. 1.

National Transit Company, a corporation under the laws of the State of New York, in 1906 was and still is a common carrier of oil by means of pipe lines and engaged in interstate commerce as such. The principal line extended from Ohio and Western Pennsylvania to Olean, N. Y., thence eastward to the southern part of that State to Unionville, and thence southeastward through New Jersey to New York Harbor. Another line extended from northwestern Pennsylvania southeastward to Millway, thence to Fawn Grove, [fol. 905] Pa., and thence across the State of Maryland to Baltimore. These trunk lines formed a substantial part of the vast system or network of pipe lines in the United States, and through them and their connections crude oil was being transported by the National Transit Company uninterruptedly from the oil fields east of the Mississippi River to New York Harbor, and to Baltimore.

New York Transit Company, a second subsidiary of the Standard Oil Company, was organized under the laws of

Pennsylvania, and was and is a common carrier of oil by means of pipe lines. In 1904 it took over from the National Transit Company its trunk pipe line from Olean to New York Harbor, and through it transported oil without interruption from Olean, N. Y., through New Jersey, to New York Harbor. It was admittedly engaged in interstate commerce in crude oil by means of its pipe lines conducted in the States of New York and New Jersey, but it did not, nor does it now, refine or purchase crude oil, or transport any oil owned by it.

In 1906 the Standard Oil Company of New Jersey and the Standard Oil Company of New York were engaged in refining crude oil in the States of New York, New Jersey, and Maryland and selling the products thereof. The subsidiary companies, National Transit Company and New York Transit Company, received crude oil at the various fields, transported it to New York harbor and Baltimore and de- [fol. 906] livered the same to the Standard Oil Company of New Jersey and the Standard Oil Company of New York at their refineries.

On the 15th of February, 1905, the House of Representatives adopted a resolution requesting the Secretary of Commerce and Labor to investigate the cause or causes of the low price of crude oil or petroleum in the United States, and the unusually large margins between the price of crude oil or petroleum and the selling price of refined oil and its products, "and to make early report of its findings, according to law, to the end that such information may be used by Congress as a basis for legislation, or by the Department of Justice as a basis for legal proceedings." (Vol. 39, Cong. Rec., Feb. 15, 1905, 2666.) On March 4, 1905, 17 days later, the House of Representatives of the Fifty-eighth Congress adjourned without day.

Eight months elapsed, during which this investigation was actively prosecuted. On the 3d day of November, 1905, the board of directors of the National Transit Company and the New York Transit Company, whose capital stock was owned and whose boards were dominated by the Standard Oil Company of New Jersey, passed resolutions authorizing the alleged sale to the Standard Oil Company of New Jersey of that portion of their respective pipe-line properties extending through the States of New Jersey and Maryland.

The first session of the Fifty-ninth Congress convened on the 4th of December, 1905. It was devoted almost entirely to the consideration of railroad rate regulation and the amendment of the Act to Regulate Commerce. Simultane-
[fol. 907] ously the Department of Commerce and Labor was continuing the investigation of the oil industry, in pursuance of the resolution.

The Report of the Commissioner of Corporations on the subject of transportation and freight rates in connection with the oil industry was transmitted by the President to Congress; this so-called Pipe Line Amendment was introduced and freely debated, and on the 29th of June, 1906, the amended act to regulate commerce was approved, and by joint resolution August 28, 1906, or 60 days after its approval, was fixed as the day upon which it should take effect.

On July 17, 1906, 18 days after the passage of the act, deeds are said to have been delivered by the National Transit Company and the New York Transit Company, respectively, to the Standard Oil Company of New Jersey, conveying to the latter the sections or ends of these pipe lines in the States of New Jersey and Maryland, and on the 28th of August, 1906, when the act went into effect, the alleged operation of these sections by the Standard Oil Company of New Jersey commenced.

The mere recital of these facts and dates is convincing proof that these conveyances were made with a deliberate purpose to evade, if possible, the legislation foreshadowed by the Report of the Commissioner of Corporations, which had been debated in Congress, and which had been enacted into law before the conveyances were passed.

Unionville is an incorporated village in Orange County, N. Y., with a population of 250; Fawn Grove is an incor-
[fol. 908] porated village in York County, Pa., with a population of 240; Centerbridge is an unincorporated village in Pennsylvania with a population of 100. No crude oil is produced, purchased (except as claimed by the Standard Oil Co.), sold or refined at Unionville, Centerbridge, or Fawn Grove; and, save for an alleged measurement at those points of the quantity of the oil in transit, the oil flows with practical continuity and the transportation now is substantially as it was before New York Transit Company and National Transit Company conveyed portions of their lines already described to the appellee Standard Oil Company.

It may be further stated that the pipe lines in question were located in part upon or across the rights of way of various railroad companies, upon or across public highways, and that "said pipe lines are and always have been located, maintained, and operated, over public highways or on the rights of way of railroad companies," and "that petitioner's predecessors in title did, at certain points, lay the pipe lines in question along or across public highways and streets in said State," and "that at various points petitioner's pipe lines are laid and are being operated upon, along, or across the rights of way of railroad companies engaged in interstate commerce." (No. 482; R. 86-88.) In its answer the United States alleges that the predecessor in title of petitioner did, for long distances, lay said pipe line in, along, and across certain of the navigable rivers of the United States, including the Hudson River, any private [fol. 909] use whereof is contrary to the public policy of the United States. (No. 482; R. 35.) Petitioner does not deny that its pipe was so laid, though it does deny that what it did in that behalf is contrary to the public policy of the United States.

The case is here on petition, answer, affidavits and certain stipulated facts.

No. 483. Standard Oil Company of Louisiana; a Louisiana corporation, with a capital stock of $5,000,000 and broad charter powers (R. 12). It produces crude oil in the Caddo field in Louisiana and purchases crude oil produced in the Mid-continent field in the States of Kansas and Oklahoma, which is brought by a pipe line, continuous in effect if not in name, from the Mid-continent field to the refinery of petitioner at Baton Rouge.

The Prairie Oil & Gas Company owns and operates a portion of this trunk pipe line which is located in the Mid-continent field in the States of Kansas and Oklahoma (R. 28). Oklahoma Pipe Line Company is a corporation organized under the laws of the State of Oklahoma as a common carrier of crude oil with the power of eminent domain. It owns the section of this trunk line which extends from a point in Oklahoma called Creek, in the south central part of the Mid-continent field, to McCurtain, a town in southeastern Oklahoma at or near the Arkansas line. At this point The Prairie Oil & Gas Company again resumes the ownership of the pipe line to and through the State of Arkansas to Ida, in the extreme northwestern part of Louisiana,

[fol. 910] where the appellee commences its ownership. Thus it appears that while the pipe line is practically continuous from the Mid-continent field to Baton Rouge, it is owned by sections, according to the States which it traverses. Physically it is a continuous transportation, although conducted under different titles.

Ida, like the villages of Unionville, Centerbridge, and Fawn Grove, is not a place where oil is refined, but is simply a pumping station on this through line from the Mid-continent field to Baton Rouge. It is unincorporated, with a population approximating 200 (R. 59, 60). The section from Ida to Baton Rouge is about 266 miles in length and is useless for transporting oil from the Mid-continent field to Baton Rouge unless operated jointly with the remaining sections of the through line. This pipe line also at various points crosses public highways and crosses and is laid upon the right of way of railroad companies. The Oklahoma Pipe Line Company, which operates that portion of the line heretofore described, filed no petition to set aside the order of the Commission directing it to publish and file tariffs, and, as to it, the order is in full force and effect.

The case is here on petition, answer, affidavits, and certain stipulated facts.

No. 506. The Prairie Oil & Gas Company; a Kansas corporation, organized in 1904, with a capital stock of $300,000, which was increased from time to time and is now $20,000,000, of which $18,000,000 has been issued and sold (R. 3). It produces and purchases crude oil in the Mid-continent field and transports the same from that field [fol. 911] in a 12-inch trunk line to Griffith, Ind., near the town of Whiting, where the refineries of the Standard Oil Company of Indiana are located. It also has a line in the States of Oklahoma, Arkansas, and Louisiana, connecting in the manner hereinbefore described with the lines of the Oklahoma Pipe Line Company and the Standard Oil Company of Louisiana. Its line to Griffith, Ind., is the only pipe line extending from the Mid-continent field eastward. This is laid in part over the right of way of the Atchison, Topeka & Santa Fe Railway Company from Sibley, Mo., to Joliet, Ill., a distance of about 500 miles (No. 506; R. 32, 33), and portions of the company's lines are laid over the public domain in the Indian Territory and Oklahoma (No. 506; R.

41 to 61, inclusive). The Mid-continent field now yields approximately one-fourth of the total production of crude oil in the United States. The Prairie Oil and Gas Company owns some 1,833 producing oil wells in this field, with an aggregate output approximating 11,557 barrels per day. It purchases about 70,000 barrels per day and claims to have a market and outstanding contracts for the delivery of 100,000 barrels per day. It has accumulated in storage and now holds more than 40,000,000 barrels—almost the total annual output of the entire field.

It is interesting to note that while others of these appellees protest against becoming common carriers because it would lead to confusion of grades in their pipes when carrying diverse grades of oil, The Prairie Oil & Gas Company protests on the ground that it is designedly mingling [fol. 912] in its pipes various grades of oil and does not desire to refrain from so doing.

While the line of The Prairie Oil & Gas Company ends at Griffith, Ind., it claims to have been able by shipment over common-carrier lines east of that point to establish a trade for its Mid-continent oil in the States of Indiana, New York, Pennsylvania and New Jersey.

Until December, 1911, the entire capital stock of The Prairie Oil & Gas Company was owned by the National Transit Company of New York, a subsidiary corporation of the Standard Oil Company of New Jersey. The Standard Oil Company of New Jersey also owned and controlled the entire capital stock of the Standard Oil Company of Indiana, which was and is the principal patron of the Prairie Oil & Gas Company. These several companies were held in *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1, to be parties to an illegal combination and conspiracy for the purpose of monopolizing the purchase, transportation, refining, distribution, and sale of crude petroleum and its products, in violation of the Sherman Act.

The case is here on petition, affidavits, answer of the Interstate Commerce Commission, and motion by the United States to dismiss the petition.

No. 507. The Uncle Sam Oil Company; a corporation organized in 1905 under the laws of the Territory of Arizona, with power, *inter alia*, to transport crude oil by means of pipe lines. It is a foreign corporation transacting

business in Oklahoma and Kansas. It produces and pur- [fol. 913] chases crude oil in the Mid-continent field, particularly in Oklahoma, and transports the same by pipe lines to Cherryvale, Kans., where it owns and operates a refinery (R. 18). Its facilities are located and its business is carried on entirely within the Mid-continent field.

A part of its pipe line is laid for a distance of 25 miles over the public domain in the Indian Territory. The Government insists that this was done under regulations prescribed by the Secretary of the Interior, providing that every pipe line so laid shall be held to be a common carrier (R. 43-45). The appellee, however, avers that it was not aware of these regulations and did not intend to assent to the same. The laws of Kansas and Oklahoma (see Appendix) impress upon oil-carrying pipe lines the character of common carriers.

The case is here on petition, answer and affidavits.

No. 508. Robert D. Benson et al., doing business as the Tidewater Pipe Company, Limited, is a limited co-partnership under the laws of Pennsylvania, with a capital stock of $625,000 (R. 7). It produces and purchases crude oil in the Indiana-Illinois-Ohio and Appalachian fields and transports the same by pipe lines from those fields to Bayonne, N. J., on New York Harbor, where it makes delivery to the Tidewater Oil Company, a New Jersey corporation, with a capital stock of $19,967,000, its sole patron with refineries at Bayonne.

The partners in the Tidewater Pipe Company are large owners of the stock of the Tidewater Oil Company. The [fol. 914] Standard Oil Company of New Jersey is, or was until quite recently, also the owner of a part of the capital stock of that company. The trunk lines in question are 6 inches in diameter. The first was built in 1878-79, from Rixford, Pa., to Williamsport, Pa. In 1884 the line was extended to Tamanend, Pa., and in 1888 to Bayonne. Another trunk line extends from Stoy, Crawford County, Ill., through the States of Illinois, Indiana, Ohio, and Pennsylvania, to Rixford.

It is alleged in the answer of the United States that the appellee has "for long distances—the exact distances this respondent is unable at this time to state—laid its said lines along the streets of the municipalities and the public highways of the various counties and States through

which the pipe lines run" (No. 508; R. 8); and this is not denied by the petitioner.

The case is here on petition, answer, affidavits, and intervening petition of the Wellsville Refining Company.

Specification of Errors

The assignments of error upon the part of the appellant may be found in the several records, as follows:

No. 481, p. 148; No. 482, p. 94; No. 483, p. 91; No. 506, p. 71; No. 507, p. 57; No. 508, p. 57. It is not necessary to repeat or summarize them here. There are some slight variances, brought about by diverse facts; the assignments are similar in substance, however, and present in varying phases the crucial question—*the contitutionality vel non of the Pipe Line Amendment of 1906.*

[fol. 915] THE ARGUMENT—FIRST POINT

The Construction of the Act

Congress deliberately intended the act to apply to every interstate pipe line. It intended to compel every interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce. Whether any particular pipe line had or had not been a common carrier prior to the passage of the act is wholly immaterial.

Both the Commerce Court and the Interstate Commerce Commission agreed in adopting this construction of the act.

The Commerce Court said (No. 481; R. 105):

> In short, we agree with the Commission in what is said in the following excerpts from its report in the pipe line proceeding:
>
> "This seems to be the plain meaning of the act, that all pipe lines, carrying oil from one State to another State, no matter what their previous status, should be thenceforward considered and deemed to be common carriers. And to uphold this construction, reference may be made to the history of this provision. • • •
>
> "Throughout the discussion there is abundant evidence that Congress passed this act for the purpose of subjecting all interstate pipe lines carrying oil to Fed-

eral regulation, and took this action consciously, in the presence of the very constitutional question now raised as to its power."

[fol. 916] The Pipe Line Amendment, Act of June 29, 1906, 34 Stat. 584, added to the first section of the Act to Regulate Commerce the words italicized below:

> That the provisions of this act shall apply to *any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, * * * who shall be considered and held to be common carriers within the meaning and purpose of this Act.*[1]

I. The Legislative History of the Act Demonstrates Its Intent

To ascertain the evils at which the act was aimed, its legislative history, the amendments that were offered and rejected during its passage, and the general history of the times, we may with propriety consult the debates in Congress attending its enactment.

Jennison v. *Kirk*, 98 U. S. 453, 459;
Holy Trinity Church v. *U. S.*, 143 U. S. 457, 465;
Am. Net. etc. Co. v. *Worthington*, 141 U. S. 468, 473;
Binns v. *U. S.*, 194 U. S. 486, 495, 496;
Blake v. *National Bank*, 23 Wall. 307, 319.

[fol. 917] Such an examination in the present instance renders it indisputably clear that the evil aimed at was the monopoly of the oil business by the Standard Oil Company, a monopoly largely, if not chiefly, due to the ownership or control by that corporation of 90% of the

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[1] As originally enacted this passage read consecutively, without the clause indicated by asterisks. This clause was inserted by the act of June 18, 1910, 36 Stat. 539, 544, and is as follows: "and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country."

pipe lines, and the unconscionable manner in which that corporation had asserted against the independent well owners the advantage resulting therefrom. The exact connection between private pipe lines and monopoly will be more fully discussed hereafter, but for the purpose of finding out what Congress meant by the legislation in question, which is all we are discussing at this point, we are interested only in the fact that Congress undoubtedly believed that such connection did in fact exist, and that the only practical means of eradicating the evil was to prohibit interstate traffic in oil by means of pipe lines except upon condition that the pipe line owners should act as common carriers.

The scheme of railroad legislation contained in the Hepburn Act of 1906 did not, as originally proposed, have any reference to pipe lines. Congress had, however, at an earlier date directed the Bureau of Corporations to enter into an extensive investigation on the subject of the transportation of petroleum. On May 4, 1906, while the debate upon the Hepburn Act was in full progress in the Senate, the Commissioner's report was transmitted to Congress. The gist of the report is contained in the following sentences:

> Chief among the advantages which, aside from present railroad discriminations, the Standard possesses are [fol. 918] the immense pipe line systems of the Company
>
> * * *
>
> The Standard Oil Company has all but a monopoly of the pipe lines in the United States. Its control of them is one of the chief sources of its power. (59th Cong., 1st Sess., House Doc. 812, pp. 29, 37.)

The report was transmitted to Congress by the President, accompanied by a message urging immediate action. (40 Cong. Rec. 6358.)

Hardly had this report and message been received when Senator Lodge arose and offered practically in its present form (the differences being immaterial here) the amendment concerning pipe lines. (40 Cong. Rec. 6361.) Senator Foraker immediately objected to Senator Lodge's amendment *on the ground that it was not restricted to pipe lines which were already common carriers, saying:*

> Mr. President, I do not want to make any opposition to the Senator's amendment, but it occurs to me that *the amendment ought to be further amended, so as to*

provide that it shall apply only to pipe lines operated for the public. I do not understand how you would compel a man who has a private pipe line of his own to become a common carrier. * * * I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are carrying for the public, and not to private lines that an individual or a single corporation may have laid down and put into operation for its own benefit. (40 Cong. Rec. 6361.)

[fol. 919] Senator Nelson replied:

In reference to the amendment suggested by the Senator from Ohio to the amendment of the Senator from Massachusetts, I desire to state that *if that amendment is adopted it will practically nullify the provision, because every one of these pipe lines can say "we refuse to do business for the public."* (40 Cong. Rec. 6365.)

Senator Lodge followed Senator Nelson, saying:

Mr. President, the purpose of this amendment is to bring the transportation of oil and other commodities within the interstate commerce law. Oil is one of the greatest articles of interstate commerce carried in this country, and it is now absolutely outside and beyond any Government regulation whatever. * * * But the amendment suggested by the Senator from Ohio (Mr. Foraker) to my amendment, to the effect that no pipe line, unless it carries for the public, shall come under this rule, will, as the Senator from Minnesota (Mr. Nelson) says, *absolutely destroy the value of my amendment.* (40 Cong. Rec. 6365.)

As the debate continued the connection between private pipe lines and monopoly was more and more clearly brought out. It was shown that oil must be carried great distances from the wells to refineries and principal markets; that, because of the cost of railroad or other forms of transportation, it is, from a practical point of view, as impossible for an independent producer to market his product without a pipe line as it would be if he had no right of egress [fol. 920] from his lands; that pipe lines are of such enor-

mous length, and hence so enormously expensive, that the construction of individual ones by independent well owners and refiners is out of the question; and that as a result the independent well owner is completely within the power of the owner of the pipe line—a power which had in fact been pitilessly used.

The following excerpts are illustrative:

> Mr. McCumber: If they are carrying their own goods and no goods of the public, how is the public interested one way or the other in the matter of their carrying their own goods through their own pipe line from one State to another?
>
> Mr. Tillman: Let me answer the Senator from North Dakota in this way: Take West Virginia, whence, I believe, comes the gas in the case mentioned by the Senator from Ohio. Of course that gas is not going down yonder three or four hundred miles without pressure, and therefore it comes from the surrounding country where originally tapped, and the gas company which has bored its wells may be robbing the landowners around it of their gas, because it has great capital and the facilities for sending it off and selling it, while the landowner, who is not able to pipe it to the market, is not allowed to pipe it through the established pipe line, because Congress will not help him. That is my conception of a just and proper reason. (40 Cong. Rec. 6362.)

* * * * * * *

[fol. 921] Senator Lodge said:

* * * * * * *

> There are twenty-eight principal pipe lines in the United States, for the most part trunk lines. There are fourteen local or gathering lines. Twelve of the principal lines are combined in one system under one control, extending from Indian Territory and from Tennessee to the Atlantic seaboard. Five other principal lines form a system under one control, extending from West Virginia and Ohio through the Pennsylvania oil fields to Philadelphia. (*Id.* 6365.)
>
> Now, Mr. President, the oil is brought to the trunk lines through small local feeding and gathering lines,

as a rule. *There are practically two great companies* that control pipe lines engaged in interstate commerce. One is the *Standard Oil*, which is said, roughly, to control 90 per cent. I do not know whether that is correct or not. The other is the *Pure Oil*. *They do not own the wells, and they buy the oil of the well owner*, and the charge for the transportation is taken out of the price, as appears in the copies of the certificates and receipts which I have here.

Those well owners are absolutely at the mercy of the pipe lines. I have had cases brought to me, which in this fifteen-minute debate I can not enlarge upon, where an independent refinery has been deprived of its supply of oil because it would not agree to the prices of the pipe lines. *A small well owner is compelled to take the price that is offered by the controller of the trunk line.*

[fol. 922] This is not a case of a transportation company owning the property, like a railroad owning a coal mine. *It is exactly like a railroad buying the coal of a coal miner and transporting it.* * * * The pipe line companies buy the oil they use in their own refineries and *owing to the fact that they buy the oil, if you put in the words "carry for the public," the pipe lines go right out from under this amendment* in my judgment. * * * It is simply to give relief, if relief is sought, to those who find that they are *not fairly treated* * * * *by the pipe lines through which alone, practically, they can get their commodity to market.* (40 Cong. Rec. p. 6366.)

Excerpt from a letter inserted into the Record by Senator Lodge as part of his speech:

I am a producer of petroleum in West Virginia and a refiner of petroleum in New York Harbor, and have considerable trouble in procuring a quantity of crude oil sufficient to run our works.

I feel aggrieved at the treatment by the Standard Oil Company, owner of the pipe lines, and the Pure Oil Company, controller of other pipe lines that run in that field. Both companies refuse to deliver to me the oil I produce, and I have to sell it to both at the prices they make.

I understand you are now trying to frame some bill that will put the people on an equality; it would be well for you to know the condition of the business and how both companies have created and keep a monopoly in the business.

[fol. 923] *Eureka Pipe Line.*—This company is owned by the Standard Oil Company. It passes through Ohio and West Virginia. It receives into its line oil that is produced on a lease I own in Wetzel County, W. Va. It takes this oil to United Pipe or National Transit Lines and is pumped through that system to Jersey City.

I have made application to the Standard Oil Company for transportation of my oil and offered to pay them the usual gathering and transportation charges. They refuse to deliver me my own oil and I have to sell it to them at their price, although I am ready to pay a premium of 10 or 20 cents a barrel over the market price and the current transportation rates.

They claim that the "Eureka Pipe Lines" is not a public carrier; that it is a private concern, and is not subject to the laws that regulate public carriers. The National Transit Line is a public carrier, but on account of the receiving or initial lines being a private concern, they need not take the oil and are not amenable to the law as public carriers are.

. . . . . .

The object of this letter is to show the condition of pipe lines that are owned by private parties or co-partnerships and not common carriers that work in connection with other lines that are common carriers.

In my opinion all pipe lines should be common carriers, and any producer of oil *anywhere* should be at liberty to sell the certificates of their oil to anyone wishing to purchase them and the oil should be re-[fol. 924] ceived and delivered to all on equal conditions. This would create an open market and the producers could get all that their product was worth.

Common carriers.—They refuse to deliver the oil to refiners where they want it, and generally deliver it in some out-of-the-way place that will cost more to take it from the point of delivery than it can be brought by rail from the point of production.

Difference in cost between rail and pipe-line rates.—Oil can be handled by pipe lines at about one-tenth what it will cost by rail.

The oil monopolies owning pipe lines generally make the outside public do their business by rail, they, through influence making rail rates while they do their business by pipe lines.

Marketing crude petroleum.—On account of the interest controlling pipe lines, viz, *Standard Oil Company* and *Pure Oil Company,* refusing to receive oil for transportation and deliver it to the owners of the oil, it prohibits an open market for crude petroleum. The producer has to sell it to the Standard Oil Company or its agents at the *Standard Oil Company's price,* and to the Pure Oil Company or the Producers and Refiners' Line (which is owned by the Pure Oil Company) *at their price,* although the owners of the oil stand ready, and in my case *I have offered a premium of 10 cents per barrel* plus all transportation and charges for my oil. (40 Cong. Rec. 6368.) (Italics theirs.)

Senator Lodge's amendment passed precisely as offered so far as our purposes are concerned. It was later [fol. 925] twice reconsidered, with the same result. For the first reconsideration, see 40 Cong. Rec. 6895, 6896, 6900; for the second, see 40 Cong. Rec. 6999. Again, Senator Foraker bitterly objected to the amendment in a speech, the keynote of which is the following sentence:

> • • • I say you have no right to make a common carrier out of a private individual who is transporting for his own particular business and has no thought or purpose of accommodating the public • • •. The way to remedy this is • • • by adding, after the word "transportation," as I suggested to the Senator from Massachusetts when he offered it, the words *"for the public."* (40 Cong. Rec. 6999.)

The following dialogue took place between him and Senator Culberson:

> Mr. Culberson. *I ask the Senator if his purpose is not carried out in the phrase beginning at line 3, page 2, "who shall be considered and held to be com-*

mon carriers within the meaning and purpose of this act," because in the case he mentions the company will not be a common carrier when only carrying gas for itself, and it will not be brought within the meaning of this act according to its own provision?

Mr. Foraker. *I have not heard of anybody putting that interpretation on that language.* I called attention to it when the matter was under consideration a few days ago, and a different view was taken of it. It does not make it very clear, but if you were to put in [fol. 926] the words "for the public," after "transportation," then there could not be any question about it, and I can not understand why that should be objected to. If there is anybody transporting in a pipe line any commodity, no matter what it may be, for the public——(40 Cong. Rec. 7000.)

Senator Foraker's proposition was rejected after Senator Lodge had again explained its purpose as follows:

* * * *If you put in the words "transportation for hire" or "transportation for the public" you absolutely destroy this amendment* so far as its effectiveness is concerned. The method of getting the oil is, as a rule, that the Standard Oil Company or the Pure Oil Company, which are the two great carriers of oil, *buy it of the well owner* and carry it, and they would immediately say they were not carrying for the public; that they were carrying for themselves. That is the reason why the word "public" or "transportation for hire" put in there would immediately wreck this amendment.

My object, I state frankly, in this amendment is to bring the pipe lines of the Standard Oil Company within the jurisdiction of the Interstate Commerce Commission. I do not see why that great corporation, with its enormous traffic in this article, should alone be exempted from the supervision and regulation of the Government. I care very little about the natural-gas feature in the amendment, but I do want to bring the Standard Oil Company somewhere within the reach [fol. 927] of the law, and, owing to the method in which most oil is bought and handled, *if you put in the words*

"for the public" after "transportation" you practically kill the amendment. (40 Cong. Rec. 7000.)

For further debate relevant to the application of the amendment to private pipe lines see 40 Cong. Rec. 7002, 7005, 7008, 7009.

Its meaning being clear, the question of its constitutionality arose, and was defended by Senator Nelson (40 Cong. Rec. 7001), and again by Representative Rhinock (40 Cong. Rec. 9337). That Congress clearly appreciated the existence of the constitutional question is further indicated by the following excerpts:

> Mr. Long. *This bill makes all pipe lines common carriers, without any exception.*
>
> Mr. Mallory. *Yes; this bill says that,* but this bill can not make a common carrier out of a line that is not a common carrier.
>
> Mr. Long. *That will be for the courts to determine* (p. 9254).
>
> Mr. Foraker. A majority of the Senate insisted that this provision should apply, as the Senator from Massachusetts contended it should, to all pipe lines, *without regard to whether they were carrying for the public or not,* his contention being that such a qualification would destroy the effect of what he was trying to accomplish (p. 9255).
>
> Mr. Long. But *the intention of this amendment,* as the Senator will admit, *is to take in all pipe lines. There are no exceptions,* and it will take a decision of [fol. 928] the courts to determine whether the Senator and myself are right in that proposition (p. 9256).

Some one suggested that the amendment had been adopted in confusion without any sufficient comprehension, but Senator Gallinger answered as follows:

> It will be noted on page 6504 that on the amendment proposed by the Senator from Massachusetts as amended there was a roll call and there were seventy-five Senators who responded to their names. So it is perfectly apparent that the Senate perfectly understood what it was doing with reference to this matter. (40 Cong. Rec. 7001.)

The act as amended went twice to conference. The first committee altered the position of the amendment, putting it in the same section with the commodities clause, which at that time covered all common carriers. In this position it would not only have applied to all pipe lines, but would have had the further effect of divorcing the ownership of pipe lines and the ownership of oil. This, however, was disagreed to. The second report restored the amendment to its original position and in the commodities clause substituted for the words "common carrier" the word "railroad." This was accepted, but not without strenuous opposition from certain Senators. Senator Tillman, a member of the first conference committee, summarizes the situation as follows:

> * * * it simply means in plain English that the Standard Oil Company has got in its work * * *. [fol. 929] We release the Standard Oil people entirely from the control of the provision which divorces the producers of commodities from the transportation of commodities——(40 Cong. Rec. 9101).

As all this discussion was directed at the Standard Oil Company, and as both the report of the Commissioner of Corporations and the debates in the Senate had already made clear that the Standard Oil Company, as to the main part of these lines at least, had never held itself out as a common carrier, there can be no doubt that Congress meant the act to apply irrespective of the pipe lines' previous history. Senator Lodge said:

> I think under this clause as it now stands, these trunk lines, which are practically 90 per cent in the control of the Standard Oil, may be compelled to take the oil of other producers. (40 Cong. Rec. 9104.)

The original discussion as to the exact application of Senator Lodge's amendment was renewed in connection with this conference report, but only served as an opportunity for Senators Culberson, Bailey, and Lodge to reiterate the meaning for which the Government contends. (40 Cong. Rec. 9103, 9104, 9644-9647.)

II. The language of the amendment is appropriate to express the intention of Congress manifested by the debates.

(1) The petitioners contended below, that whatever Congress may have intended when the amendment was enacted, nevertheless, the language itself is susceptible of a [fol. 930] construction that would confine it solely to those companies (comparatively few) which were common carriers prior to 1906. In support of this position, the primary and normal meaning of the words "engaged in the transportation of oil" was argued to be, "engaged in *the business of* transporting oil *for the public for hire.*" The short answer is, that the petitioners are urging the court not to construe the statute, but to rewrite it, and to insert words never there,—the very words, in fact, deliberately rejected by Congress when Senator Foraker tried to amend the carefully chosen language of Senator Lodge. Obviously such a position is untenable, and so the Commerce Court decided. (No. 481; R. 100.)

(2) It was further urged that the concluding clause of the amendment, "* * * *who shall be considered and held to be common carriers within the meaning and purpose of this act*" is merely descriptive, not mandatory, and confines the operation of the preceding language to those lines which may be held to have been common carriers all along. Clearly such an argument substitutes a strained and artificial meaning for the normal and primary meaning of the words. Clearly the clause is mandatory; it is the very formula most frequently used in statutes where it is desired to include something which would not ordinarily be connoted by the words themselves. It is immaterial, says Congress, whether these pipe lines are common carriers in fact; they shall in any case be *considered* common [fol. 931] carriers for "*the purpose of this act.*" The instances where these or similar words have been used to express a mandatory intention are innumerable. The following are a few:

Act to Regulate Commerce, sec. 6:

> Whenever the word "carrier" occurs in this act *it shall be held* to mean "common carrier."

Cardinel v. *Smith*, 5 Fed. Cas., No. 2395:

> When an act (14 Stat. 144) declares that dealers in canned goods, under certain circumstances, "*shall be*

deemed the manufacturers thereof," it is equivalent to declaring that such dealers shall be treated and held liable as if they were manufacturers, notwithstanding they are not such in fact. (Syllabus.)

Revised Statutes, sec. 2172:

The children of persons who have been duly naturalized * * * *shall*, if dwelling with their parents, *be considered* as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, *shall* though born out of the limits of jurisdiction of the United States, *be considered* as citizens thereof; * * *

36 Stat. 96, sec. 7:

* * * and if the appraised value of any merchandise shall exceed the value declared in the entry by more than seventy-five per centum * * * such entry *shall be held* to be presumptively fraudulent * * *.

[fol. 932] *36 Stat. 89, sec. 23:*

* * * but this privilege *shall not be held* to apply to implements, machinery, or apparatus to be used in the construction of any bonded warehouse * * *.

36 Stat. 103, sec. 25:

* * * and evidence of such giving, or offering, or promising to give, satisfactory to the court in which such trial is had, *shall be regarded* as prima-facie evidence * * *.

Revised Statutes, sec. 2174:

* * * and every seaman, being a foreigner, *shall* after his declaration of intention to become a citizen of the United States * * * *be deemed* a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, * * *.

The Pure Food Law, 34 Stat. 768:

SEC. 7. That for *the purposes of this act* an article *shall be deemed to be* adulterated * * * in the case of foods * * * when * * *, etc.,

giving many instances where the condition termed adulterated could not possibly be regarded as such within any ordinary use of the word.

> SEC. 12. * * * The word "person" as used in this act *shall be construed to import* both the plural and the singular, as the case demands, and *shall include* corporations, companies, societies, and associations. When construing and enforcing the provi- [fol. 933] sions of this act, the act * * * *shall in every case be also deemed to be* the act, etc. * * *.

Revised Statutes, sec. 1:

> * * * a requirement of an "oath" *shall be deemed* complied with by making affirmation in judicial form.

Revised Statutes, sec. 5:

> The word "company" or "association" when used in reference to a corporation, *shall be deemed* to embrace the words "successors and assigns of such company or association," in like manner as if these words, or words of similar import, were expressed.

Colorado R. S., 1908, sec. 2439:

> Any such corporation or corporations * * * *shall be deemed a common carrier* * * *.

Oklahoma constitution, Art. IX, sec. 34:

> As used in this article the term "transportation company" shall include * * *; the term "rate" *shall be construed to mean* * * * etc.

Missouri R. S., 1899, sec. 4160:

> * * * seventeenth, * * * the place where any person having no family shall generally lodge, *shall be deemed* the place of his residence.

See also Revised Statutes, secs. 2162, 1770, 1771, 1772, 1782, 1787, 1788, 1789.

Many of these examples, it is true, use the words "shall be deemed to be" or "shall be construed to be," but clearly [fol. 934] there is no essential difference between such ex-

pressions and the words "shall be considered and held to be." To the normal user of English the latter is as appropriate to express the meaning which the legislature intended to convey as are the former. It would be a most artificial construction which should attempt to distinguish between them.

(3) In conclusion, attention is asked to the fact that while the act in terms refers to "common carriers by railroad" (sec. 1), Congress studiously and significantly avoided the use of any such phrase, as "common carriers by pipe line" or "common carrier pipe lines."

III. The Rule of Construction followed in the "Commodities Case," 213 U. S. 366, Is Not Applicable Here

The following excerpts from the opinion of the Court below follow and accurately set forth the Government's position on this point (No. 481; R. 101-104):

> These considerations are sought to be fortified by invoking the familiar principle that where a statute permits of two constructions, one of which involves serious questions of constitutional power and right, while the other would be free from constitutional objection, the latter should be adopted. Numerous cases illustrating and enforcing this principle are brought to our attention, of which one of the latest is the well [fol. 935] known "Commodities Case," *United States* v. *Delaware & Hudson Company*, 213 U. S. 366. Upon these authorities the contention is earnestly pressed that the amendment should be held to apply to only such pipeline companies as are or may be adjudged to be common carriers, because the broader construction upon which the Government insists, and which would, in in effect extend the amendment without limitation or qualification to all persons and corporations engaged in the interstate transportation of oil by means of pipe lines, including those who use this means solely for transporting their own oil over their privately acquired rights of way, necessarily gives rise to "grave and doubtful constitutional questions," 213 U. S., supra, and perhaps to "a succession of constitutional doubts," as was suggested in the *Harriman case*, 211 U. S. 422.

That the argument thus summarized is not without force may be conceded. *The objection to its acceptance does not arise from any doubt concerning the rule of interpretation invoked, for that rule is well settled, but rather from the lack of any substantial basis for its application. It is only when a statute is ambiguous or obscure, or wanting in definiteness, so that its real intent and meaning are uncertain because the language permits differing interpretations, that the rule in question may be applied.* If the legislation is clearly expressed and of unmistakable import, so that there is no room for reasonable doubt as to what the lawmaking body intended to accomplish, the courts [fol. 936] are not at liberty to frustrate or modify the legislative intention, but must accept and deal with the statute in accordance with the manifest purpose which it expresses.

To our apprehension the meaning of this amendment is not open to serious question. It is a clear and comprehensive declaration, in no respect indefinite or incomplete. The concluding phrase is not a limitation or restriction, but on the contrary was plainly inserted for the purpose of fixing the legal status of the persons and corporations included in precise terms in the preceding description, to the end that they should be regarded and treated as common carriers subject to the act by all officials who are or may be charged with the administration and enforcement of the regulating statute. In our judgment the amendment permits of no other or different construction, and we must therefore accept it as a plain and unambiguous measure, designed to effect a complete and definite purpose.

In support of this view we need cite only the first *"Employers' Liability cases,"* 207 U. S. 463, 500. It seems evident to us that the statute then under consideration was not clearer or plainer than is the amendment in question, nor were its terms any more comprehensive and unqualified. To uphold the constitutionality of that enactment the Government stoutly contended that it should not be construed as applying to all the employees of any common carrier engaged in interstate commerce, although all were in- [fol. 937] cluded in the language defining its scope, but should be held to embrace only such employees as

were, or when they were, themselves engaged in interstate commerce; and this view is reflected in the dissenting opinion of Mr. Justice Moody. But a majority of the court, speaking through Mr. Justice (now Chief Justice) White, rejected the argument in an opinion from which the following is quoted:

"So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employee,' as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce; but this would require us to write into the statute words of limitation and restriction not found in it. * * * To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; * * *

"The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional; but this does not imply, if the text of an act is unambigous, that it may be rewritten to accomplish that purpose."

[fol. 938] SECOND POINT

The Constitutionality of the Act

The act construed as applying to all interstate oil-carrying pipe lines and making it a condition upon their operation that they shall act as common carriers does not violate the Fifth Amendment to the Constitution.

Upon this inquiry the court below defined its province in the language of *Minnesota* v. *Barber*, 136 U. S. 313, 320, as follows:

* * * Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining

those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.

And referred also to *C. B. & Q. Ry.* v. *Drainage Commrs.*, 200 U. S. 561, 593, in which it was said:

> * * * If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. * * * If the injury complained of is only incidental to the legitimate [fol. 939] exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.

We submit to the test adopted by the court below and with reference to the act under discussion maintain that:

(1) The object of the act is one for which the Federal authority may properly be exercised.

(2) The means employed have in fact a real and substantial relation to the object sought, and are reasonable in themselves, and not arbitrary or beyond the necessities of the case.

(3) The act is therefore valid, for it does not violate any express prohibition of the Constitution.

Or, to paraphrase the classic statement of the Chief Justice in *McCulloch* v. *Maryland*, 4 Wheat. 421, the end is legitimate and within the scope of the Constitution, the means are appropriate, are plainly adapted to that end, are not prohibited, and consist with the letter and spirit of the Constitution.

I. The object of the Pipe Line Amendment, namely, to regulate interstate commerce in oil by protecting well owners and independent refiners from duress by pipeline owners, rendering possible real competition, and preventing monopoly of the interstate commerce in oil,

is one for which the authority of Congress may properly be exercised.

The purpose of the act was the prevention of monopoly. This has been fully shown in the preceding point.
[fol. 940] It is clear that Congress recognized the economic advantage possessed by the pipe-line owner whereby he was able to oppress unreasonably the small well owner and refiner, and to draw into his own hands at his own terms the entire crude output in the region tributary to his line and the consequent control of the industry. The *Report of the Commissioner of Corporations* declared this to be one of the "chief sources" of the power of the Standard Oil Company (59th Cong., 1st Sess., House Doc. 812, p. 37), a "natural advantage due to its enormous capital" (p. 62).

Clearly, whatever we may think of the *means* chosen, the *purpose* was legitimately within the field of legislative power. The Government may always intervene to prevent an economic advantage from being made the instrument of oppression. There is no inalienable right to do injustice.

Competition is the basis of our economic policy. But not war to the knife and the knife to the hilt. The whole history of remedial legislation is the history of checks invented by society to prevent the stronger, richer, or more crafty from wringing from their fellow men advantages unreasonably disproportionate to their own superiority.

The prevention of monopoly by the prohibition of business methods which tend to produce it is only one example of this principle. (*Standard Oil Co.* v. *United States*, 221 U. S. 1; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109; and see the very strong recent case upholding stat-
[fol. 941] utes against local price cutting, *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.) The regulation of public service companies is another. (*Wyman, Public Service Corporations*, Chap. III.)

But the principle has an infinitely wider application. As was well said by Mr. Justice Holmes in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 271:

> Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be

made illusory by the economic situation of one of the parties.

Thus manufacturers may be compelled to pay weekly wages because any other system tends to give the employer, by reason of his economic position, an unfair advantage over his employees. (*Opinion of the Justices*, 163 Mass. 589.)

Laws compelling the payment of wages in cash, instead of company store orders (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13), and laws forbidding the payment of seamen's wages in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169), stand upon the same basis, and so do Employer's Liability Acts (*Second Employer's Liability Cases*, 223 U. S. 1), and loan-shark laws (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225).

Doubtless there were those who complained that property rights and freedom of contract were unduly restricted when men were first forbidden to sell themselves as debtor slaves, yet only recently laws carrying the same idea two [fol. 942] steps beyond, and forbidding women, and even men, to hire themselves to excessive daily labor have been sustained by this court. *Muller* v. *Oregon*, 208 U. S. 412; *Holden* v. *Hardy*, 169 U. S. 366.

The statute now under consideration simply presents once more the ancient conflict between the unrestrained and injurious use of property and justice.

II. The means employed, the prohibition of pipe lines except upon condition that they act as common carriers, has a real and substantial relation to the object sought, the prevention of monopoly, and is not arbitrary or beyond the necessities of the case.

The Pipe Line Amendment in substance prohibits purely private pipe lines and declares that henceforward oil shall be transported through pipe lines in interstate commerce by common carriers alone.

A majority of the court below, admitting the Government's argument as to the construction and purpose of the act, nevertheless were of opinion that there is no reasonable relation between the private operation of pipe lines and the upbuilding of monopoly. In other words, in the last analysis, the decision below turns upon a question of fact,

namely, whether Congress was wholly unreasonable in believing that the owners of pipe lines have such an advantage over the well owners and purchasers of crude oil as warrants governmental intervention.

[fol. 943] The following excerpts from the opinion, which we designate "premise" and "conclusion," demonstrate the error of the court:

Premise:

> True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. *The practical result may be, and in most instances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line,* and in this sense it may be said that *they are obliged to sell to him. Granted that his pipe line gives him such command that he is able to control or even fix the selling price of the crude article in that particular field or territory,* upon what sustainable theory can it be claimed that other producers are deprived of anything which rightfully belongs to them because they do not or can not provide themselves with the same means of reaching the market? * * * (No. 481; R. 125.)

* * * * * * *

Conclusion:

> In our judgment there is no basis for the contention that the pipe-line amendment has any real or substantial relation to the monopoly. (No. 481; R. 127.)

Thus the court below seems to have disregarded the established rule that the presumption favors the conclusion of Congress on such questions of fact. Chief Justice Marshall said in *McCulloch* v. *Maryland*, 4 Wheat. 315, 423:

> [fol. 944] But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into *the degree of its necessity*, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

And this principle has been applied in such cases as *Powell* v. *Pennsylvania*, 127 U. S. 678-685, *Austin* v. *Tennessee*, 179 U. S. 343-348-9, and *Jacobson* v. *Massachusetts*, 197 U. S. 11-31, which illustrate the reluctance with which the court should oppose its personal views to the deliberate judgment of the legislative branch and a strong preponderating public opinion.

In *Powell* v. *Pennsylvania* the court quotes with approval the language of Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, to the effect that "every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Continuing the court says (p. 685):

> It is not a part of their (the courts) functions to conduct investigations of fact entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such [fol. 945] questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large.

And in *Austin* v. *Tennessee*, *supra*, a State statute prohibiting the sale of cigarettes was upheld, the court saying:

> Cigarettes do not seem, until recently, to have attracted the attention of the public as more injurious than other forms of tobacco, *nor are we now prepared to take judicial notice of any special injury resulting from their use* or to indorse the opinion of the Supreme Court of Tennessee that "they are inherently bad and bad only." At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a *belief in their deleterious effects*, particularly upon young people, *has become very general*, and that communications are constantly finding their way into the public press denouncing their use as fraught with great dan-

ger in the youth of both sexes. *Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold or to prohibit their sale entirely* (348, 349).

But aside from the presumption in favor of the law, it is clear, the court below to the contrary notwithstanding, that Congress was fully justified in concluding—

[fol. 946] (1) That the private operation of pipe lines carrying oil in interstate commerce tends to monopoly.

(2) That an appropriate means of reaching the evil was to prohibit their operation save as common carriers.

Of these in order:

(1) The private operation of pipe lines carrying oil in interstate commerce tends to monopoly

This court itself has independently reached the same conclusion as did Congress. The findings of the court below as to the relation between the pipe lines and the monopoly is directly opposed to the findings of this court in *Standard Oil Company* v. *United States*, 221 U. S. 1. The petition in that case charged, *inter alia:*

> * * * restraint and monopolization by control of pipe lines * * * (221 U. S. 42.)

The decree of the Circuit Court sustained this charge and stripped the Standard of most of the very pipe lines here in question. Nor can we forbear to note that the same distinguished counsel who now represent that corporation, then, as now, protested in the following terms:

> The ownership of the pipe lines has not been a means of monopolizing. Substantially all of the pipe lines owned by the Standard Oil companies have been constructed by those companies. There has never been any exclusion of anyone from the oil fields either in the production of oil, or its purchase, or its storage, or its gathering or transportation by pipe lines. Ownership of the pipe lines does not give the Standard [fol. 947] companies any advantages in dealing with the producers which are not open to others.
>
> The decree erroneously includes and operates upon several of the appellant companies. (221 U. S. 12.)

Nevertheless this court, while not in terms referring to that contention, in effect completely overruled it by supporting the portion of the decree complained of (221 U. S. 80-81); in other words, it held these pipe lines to be what their counsel claimed them not to be—"*the means of monopolizing*" the oil industry.

The decision of the *Standard Oil Case* necessarily involved the affirmation of the principles upon which this suit must be decided.

Furthermore, there have been two most thorough investigations of this question, made by direction of Congress; first, the investigation in 1905-6 by the Commissioner of Corporations, whose report was the occasion for the passage of the law in question; second, the investigation in 1906-7 by the Interstate Commerce Commission.

The Report of the Commisioner of Corporations, entitled "Report on the Transportation of Petroleum" (59th Cong., 1st Session, House Doc. 812) contains the following statements:

> The Standard Oil Company, by reason of its vast resources, its efficient organization, and its extensive facilities, has, apart from traffic discriminations, advantages in transportation which are now commonly spoken of as natural. * * * Chief among the advantages which, aside from present railroad discrimi-[fol. 948] nations, the Standard possesses are the immense pipe-line systems of the company, which enable it at low cost to collect crude oil at highly favorable locations for refining. * * * The advantages of a pipe line over a railroad in the transportation of oil can hardly be overstated (p. 29).
>
> This estimated cost of transportation by pipe line is only about one-fourth the cost of rail transportation. * * * The advantage which the Standard Oil Company possesses, by reason of its practice of transporting crude oil from the field to distant refineries by means of pipe lines, may be considered in part a *natural advantage due to its enormous capital* * * * (p. 62).
>
> The Standard Oil Company has all but a monopoly on the pipe lines in the United States. Its control of them is one of the chief sources of its power (p. 37).

The Report made by the Interstate Commerce Commission (59th Cong., 2d Session, House Doc. 606), from "thou-

sands of pages of testimony," taken at public hearings, where witnesses testified under oath, Standard Oil counsel were present, and the right to cross-examine and to tender counter testimony was fully accorded (p. 2), is even more emphatic. It says:

> At the basis of the monopoly of the Standard Oil Company in the production and distribution of petroleum products rests the pipe line. • • •
>
> The advantages which the possession of these pipe lines gives to the Standard are apparent upon the [fol. 949] surface. The refineries of the independent producer who, as a rule, has no pipe line of any considerable extent, and who generally depends upon that of the Standard for his supply of crude material, are located for the most part near the source of the crude supply. Upon the other hand the Standard locates its refineries near the great centers of distribution. • • •
>
> The possession of these pipe lines enables the Standard to absolutely control the price of crude petroleum and to determine, therefore, the price which its competitors in a given locality shall pay. • • • (p. 5).
>
> In any industry whoever controls the avenues of transportation of either the raw material or the finished product can speedily drive all competitors out of existence. The production and distribution of petroleum is no exception to this rule. While there may be a feeble competition in limited areas, even that must rest largely upon the sufferance of the Standard Oil Company so long as it has practically the exclusive use of its present system of pipe lines (p. 6).

Conclusions

> We were required by the resolution under which this investigation has proceeded to suggest remedies for ascertained wrongs.
>
> *More than anything else the pipe line has contributed to the monopoly of the Standard Oil Company, and the supremacy of that company must continue until its rivals enjoy the same facilities of transportation by this means.* • • • (p. 14).

[fol. 950] Other public authorities have reached similar conclusions. The Secretary of the Interior by a regula-

tion promulgated pursuant to 33 Stat. 65, effective December 21, 1906, refused to grant pipe line rights of way through public lands in Oklahoma and Indian Territory except upon condition that the grantees accept and deliver shipments of oil at any regular station on their line. Similarly the legislatures of Kansas (*Laws 1905*, Ch. 315, Sections 1, 2) and West Virginia (*Code W. Va. 1906*, Sections 2229, 2829, 2830), and perhaps others have prohibited pipe lines altogether except upon that basis.

The reasons are obvious. It is an accepted economic principle that certain industries, particularly those carried on by means of expensive transportation facilities, possess an inevitable tendency to monopoly, and are in fact one kind of *natural* monopoly. The pipe liens stand upon the same basis as water companies, gas companies, electric lighting systems, railroads, telephones, and all the other "industries of increasing returns."

They differ from the others chiefly in this, that in the case of other industries, the danger to the public lies in their power to extort an unfair price for the commodity they *sell*, as water, gas, electricity, transportation, storage, etc. But if the public is harmed by any one corporation becoming the exclusive *seller*, so it may be harmed by any one corporation becoming the exclusive *buyer;* especially when the commodity bought is an article of public need [fol. 951] and of which the exclusive buyer at once becomes the exclusive seller also. Men are harmed in exactly the same way by being forced to sell their oil too cheap as by being forced to buy their oil too dear. One form of extortion is as unjust and as harmful to the public as the other, and the pipe-line owner has a constant opportunity for both.

It is idle to suggest that the individual well owners or refiners ought to build pipe lines of their own. Every farmer might equally as well construct a railroad and every cottage have its private gas plant. The initial cost is too great and quantity of oil too small. The *Report of the Commissioner of Corporations* turns the light of history on this suggestion and disposes of it in the following language (59th Cong., 1st Sess., House Doc. 812, p. 30):

> Nor has the failure of independent shippers to construct pipe lines of their own been due wholly to lack of enterprise on their part. It is obvious that the

> construction of a vast pipe line system requires an amount of capital far beyond the resources of the average independent refiner. This method of transportation for long distances is in fact economical only where the volume of traffic is great. The methods of competition practiced by the Standard Oil Company have prevented its competitors from building up a business sufficient to justify such outlay. An attempt was made in the case of one important independent pipe line enterprise—that of the United States Pipe Line Company—to avoid this difficulty by cooperation, but it was only after nine years of large expenditure [fol. 952] and constant struggle against opposition of both the Standard Oil Company and the railroads that this company finally completed its lines to tidewater, and this line is a very small one compared with those of the Standard. An earlier enterprise, that of the Tidewater Oil Company, which laid the first pipe line to the seaboard, was so bitterly attacked by the same interests that it speedily surrendered to the Standard Oil Company.

The same practical necessities which this report points out as the origin of the monopolistic character of pipe lines were held to be the origin of the monopolistic character of railroads by this court itself in *Texas and Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197, 210:

> Before we consider the phraseology of the statute, it may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means

[fol. 953] of carriage. From the very nature of the case, therefore, railroads are *monopolies*, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. * * *

In practical result, and that is the thing courts and legislatures are concerned with, the small well owner is in a position very closely resembling that of the mine owner in *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527, who had no right of way out of his mines; or the owner of the arid land in *Clark* v. *Nash*, 198 U. S. 361, who had no means of bringing water in, and was allowed to use his neighbor's irrigation ditch. The shipment of oil except by pipe line is a practical impossibility. No other means of transportation can possibly compete with it. Without a pipe line the oil producer is, as it were, shut in by an impassable barrier.

But even these analogies do not adequately express the difficulties of the small producer. The possibilities of duress are even greater in the case of oil wells than in the case of mines and arid lands. The mine owner can shut up his mine and hold it, but the wells once opened can not be closed to await a more convenient season. And if they could be, or if they were not opened in the first place, the owner of the oil land would only lose instead of gain by waiting, because oil lies in great subterranean reservoirs, and the pumping of the wells upon adjacent lands would drain the common source. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190. Therefore the small producer is compelled either to sell his oil, or to sell the wells themselves, to [fol. 954] the owner of the pipe line at whatever terms the latter may choose to offer.

He is caught beneath the sheer weight of capital, and has no alternative except to yield.

The court below says that there is no connection between monopoly and a situation where "the greater number of oil producers are virtually compelled to sell their output to the owners of private pipe lines" (No. 481, R. 127); but Mr. Justice Holmes said, in *Swift* v. *U. S.*, 196 U. S. 375, 402:

> No more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

It is largely the use of this potent instrument that has built up these enormous capitalizations; that has paid these enormous dividends; that once at least has thrown the oil industry of the whole United States into the hands of a single group of capitalists. The evidence in the *Standard Oil Case* proves it; the statistics in the Government reports prove it; the facts were in the mind of Congress when it passed this legislation. Congress has declared the possibility of its recurrence a menace to the public welfare. Congress has struck down monopoly full grown. It now seeks to destroy the source from which it sprang.

But the court below says that Congress is quite mistaken; that pipe lines have no relation to monopoly; that the right to injure the public in general and one's neighbors in particular is merely one of the legitimate and inviolable advantages arising from the acquisition of substantial amounts of property.

[fol. 955] (2) An Appropriate Means of Reaching the evil Was to Prohibit the Operation of Interstate Pipe Lines Save as Common Carriers

Having, then, reached the conclusion that the private operation of pipe lines tended to the public injury, was not the course which Congress took appropriate and reasonable to prevent that injury? What else could Congress have done? Any attempt to regulate the amount of oil the pipe-line owner should draw from a given field suggests at once impossible complications, even if such a step were constitutional, and not conflicting with State authority.

Strict regulation of such pipe lines as were already common carriers would have afforded only partial relief. Most of the important lines were not common carriers. Those that were ostensibly common carriers usually had their legal termini in the woods at the crossing of a state line (Fawn Grove, Center Bridge, or Unionville, for example; No. 482, R. 4-5), where their delivery stations were purely fictitious. The real termini where oil would normally be received or delivered, were owned by separate, non-common-carrier corporations.

Disintegration of the Standard Oil Company (ultimately approved by this court as a reasonable means to the similar end sought in the *Standard Oil Case*, but not yet attempted

when this act was passed), would not have freed the producer of the raw material. Each separate pipe line would still have held a monopolistic power within its own tribu-[fol. 956] tary area. Moreover, this would merely have destroyed one particular monopoly, leaving still available the means by which others might be created.

Government ownership either by the construction of new pipe lines (involving sheer economic waste of duplicating plants), or by the condemnation of existing lines would have been a step so radical, with possibilities of such far-reaching evils, that Congress was well justified in refusing to take it so long as any other possible alternative existed.

The course actually selected does not take the pipe line out of the possession of its owner. It does not compel him against his will to engage in the business of carrying oil as a common carrier. He may discontinue the use of his pipe line entirely if he chooses. He may continue to operate it, accepting and carrying for reasonable compensation and under reasonable regulations and conditions whatever oil others may offer him together with his own. Or he may sell the pipe line to some one else who will so operate it. His position in no whit differs from that of the various banking companies discussed in *Noble State Bank* v. *Haskell*, 219 U. S. 575-580, as to which the court said:

> In this case there is no out and out unconditional taking at all. *The payment can be avoided by going out of the banking business and is required only as a condition for keeping on from corporations created by the State.* We have given what we deem sufficient reasons for holding that such a condition may be imposed.

[fol. 957] *Nor does the act require anything even remotely resembling the impossible.*

The operation of pipe lines as common carriers is beyond question commercially practicable, and has been universally recognized.

Turning for light upon this question to sources such as were examined by this court in *Shollenberger* v. *Pennsylvania*, 171 U. S. 1, 7-8-9, and *Muller* v. *Oregon*, 208 U. S. 412, 419, we find the following:

(*a*) *Prior Federal legislation.*

An act of Congress (33 Stat., 65) authorizes the Secretary of the Interior to grant pipe lines rights of way through Oklahoma and Indian Territory under such conditions as he shall prescribe. Pursuant to this act the Secretary promulgated, effective Dec. 21, 1906, a set of regulations for the granting of such rights of way which provided that—

> • • • no application for the construction of a pipe line will be approved unless the applicant agrees that such pipe line shall be held to be a common carrier and agrees to all the provisions hereof. • • •. The approval of any application for oil-pipe lines and other privileges is on the condition that the permittees thereof shall accept and deliver shipments of oil at any regular station on their line.

(*b*) *Prior Federal decisions.*

Although under the authority of the *Shollenberger case, supra,* (where the court considered evidence given in the case of *People* v. *Marx,* 99 N. Y. 377, 381) this court might perhaps look into the record of the evidence in the case [fol. 958] of *Standard Oil Co.* v. *U. S.,* 221 U. S. 1, it is doubly certain of that right in view of the fact that by stipulation of counsel that evidence was made a part of the record before the Commission. A summary of such portions of the Standard Oil evidence as relates to pipe lines may be found, accompanied with citations to the original record, in the Government brief in that case (U. S. records and briefs, 1910) at pages 140, 154, 169-177 of Vol. I, and pages 22, 67-150 of Vol. II. We call the attention of the court particularly to pages 106-120 of Vol. II, where there is extended discussion of evidence based upon elaborate experiments, proving that it is commercially practicable for pipe lines to act as common carriers.

(*c*) *State legislation.*

The following States (including practically all in which any considerable production of crude oil exists) have granted to pipe lines the power of eminent domain and have otherwise recognized the fact that they may act, and do commercially act, as common carriers. Kansas and

West Virginia, at least, have prohibited them on any other basis. The Kansas statutes are particularly interesting, since they contain full provisions for treating oil as grain and other fungible goods are treated in elevators and warehouses. The date immediately following the name of each State is the year in which its statutes on the subject were enacted:

Arkansas (1905); §§ 2991*a*-2991*b*, Supp. Kirby's Dig. Ark. Stat., 1911.

[fol. 959] *California* (1891); Code C. P., s. 1238, par. 10.

Colorado (1891); R. S. Colo., 1908, ss. 2461, 2439.

Illinois (1913); "An act to provide for the regulation of public utilities."

Indiana (1891); Burns. Annot. Ind. Stat., 1908, s. 5148 et seq.

Kansas (1905); Laws, 1905, ch. 315, ss. 1, 2. Dassler's Gen. Stat. Kan. ch. 48, Art. IV.

Kentucky (1900); Ky. Stat., 1909, s. 3766 *b*.

Louisiana (1906); Acts of State of La., 1906, No. 39, p. 54; also Act No. 36 (*id.* 52).

Nebraska (1903), ss. 4575, 4581, Comp. Stats., 1911.

New York (1890); Birdseye's C. & G. Consol. N. Y. Laws, vol. 5, s. 50, p. 6311-6316.

Ohio (1868); Page & Adams Annot. Oh. Gen. Code, ss. 10128, 10129, 10132.

Oklahoma (1908); Const., art. 9, ss. 2, 4, 18, 31, 34; s. 786 (1890); ss. 4309, 4313 (1909) Rev. Stats.

Pennsylvania (1872, 1883, 1907); P. & L. Dig., 1910, vol. 1, p. 1903; *Id.* vol. 3, p. 6399.

Texas (1899); Supp. to Sayles Tex. Civ. Stats., 1897-1906, p. 104, ch. 15a. §§ 1-6.

West Virginia (1879); Code of W. Va., 1906, ss. 2229, 2829, 2830 to 2851, inclusive.

Wyoming (1891); Const., art. 10, § 7; Wyo. Comp. St., s. 4202[1]

[1] For convenient reference we print the several statutes referred to as an Appendix to this brief.

[fol. 960] (*d*) *State decisions.*

The following cases, either directly or obiter, hold that pipe lines are, or may become, common carriers:

W. Va. Transp. Co. v. *Volcanic Oil & Coal Co.*, 5 W. Va. 382.
W. Va. Transp. Co. v. *Ohio River Pipe Line Co.*, 22 W. Va. 600.
Gas Co. v. *Lowe and Butler*, 52 W. Va. 662, 664, 665.
Griffin v. *S. W. Pa. Pipe Line*, 172 Pa. St. 580.
Columbia Conduit Co. v. *Commonwealth*, 90 Pa. St. 307.
Nat. Transit Co. v. *Weston*, 121 Pa. St. 485, 494.
Boyle v. *Smithman*, 146 Pa. St. 255.

(*e*) *Public records and reports.*

40 Cong. Rec., part 7, pages 6361-6373, and the other citations given under Point I of this brief, to the debates accompanying the passage of this act, show that the practicability of pipe lines as common carriers was perfectly familiar to those cognizant with the oil industry.

The Report of the Commissioner of Corporations, 59th Congress, 1st session, House Doc., vol. 100, No. 812, pages 29, 36, 44, 49, 60-62, 86. This is the report upon which the present act was based. It shows the practical monopoly of the pipe lines by the Standard Oil Company, the enormous advantages arising from their control, and the utter impossibility of bona fide rail competition.

Report of the Commissioner of Corporations on the Petroleum Industry (May 20, 1907), Part I, pp. 26-38; 152 *et seq;* [fol. 961] 196-206, which discusses the entire subject with even more fullness than the earlier report.

The tariffs of other pipe-line companies filed with the Interstate Commerce Commission show that numerous companies, including the Texas Company, the largest competitor of the Standard Oil Company, and numerous subsidiaries of the Standard Oil itself, are acting as common carriers, and many of them have so acted for years. A partial list of those which have filed tariffs is as follows:

National Transit Co.
N. Y. Transit Co.
Producers & Refiner's Oil Co. (Ltd.)
Buckeye Pipe Line Co.

Columbia Pipe Line Co.
Crescent Pipe Line Co.
Cumberland Pipe Line Co.
Emery Pipe Line.
Eureka Pipe Line Co.
Gulf Pipe Line Co.
Indiana Pipe Line Co.
S. W. Pennsylvania Pipe Lines.
Southern Pipe Line Co.
The Texas Co.
United States Pipe Line Co.

(f) Current sources of public information, encyclopedias, textbooks, etc.

Encyclopedia Britannica, 9th ed., vol. 18, p. 718, sub. tit. Petroleum, contains a description of the practice of treating oil like grain in elevators wherever pipe lines are common carriers.

New International Encyclopedia, Vol. XIII, p. 1020, gives the different grades of oils, which, measured by [fol. 962] specific gravity, range from 30° to 46° on the Baumé scale, in which water has a specific gravity of 10.

Wyman, Public Service Companies, s. 416, states that pipe lines should be made common carriers and compelled to handle oil as grain elevators handle grain.

(*g*) And finally, even admitting the allegations of fact contained in the pleadings in the present cases they do not make out (as to establish their case they must make out) the commercial impossibility of the common carriage of oil.

For instance, The Prairie Oil & Gas Company, No. 506, alleges only that oils of the *highest and the lowest* grades can not be transported through pipes *of the kind now owned* by them, without much intermixture as would leave the common stock *more valuable* than the poorer and *less valuable* than the best grades of oil. Clearly such allegations make out no case of impossibility. There are *many* grades of oil, and the petitioner might properly impose reasonable limits as to the grades it would receive, as a railroad is not compelled to carry whole steel bridges or other articles unfit to be carried on railroads. Such regulations are found in the tariffs of those companies who do act as common carriers. (See certified copies of regulations of the Texas Co. and of the National Transit Co., No. 481; R. 155-159.)

Furthermore, petitioners have not alleged that they could not, by reasonable readjustments of their facilities (as, for instance, cutting out "loops," or devoting one pipe to one [fol. 963] sort of oil and another to another), carry even the highest and lowest grades with so little mixture that it would be commercially negligible.

And finally, although they allege that the resulting mixture would be *more* valuable than the poorer and *less* valuable than the best, they do not, and they could not, allege that it would be so much more or so much less valuable that a scheme of differentials *could* not be devised, whereby the shipper might pay or receive a proper allowance, according to the character of his oil, and accept either his own slightly contaminated oil, or a like quantity of general intermixture, at destination; nor do they allege that carriage of the intermediate grades would not be commercially practicable.

The Uncle Sam Oil Co., No. 507, alleges that it—

> has no means whereby it could receive, store, transport, and deliver to another *the same oil* that should be tendered for transportation; that *under these conditions* it is physically impossible for your petitioner to assume the duties and responsibilities of a common carrier to receive, store, transport, and deliver to the consignee or owner the *same* oil which may be tendered for shipment. (R. 4.)

These allegations require no further comment, for we have already shown above that delivery of the identical molecules is not essential to the common carriage of oil.

[fol. 964] *No. 508, Robert D. Benson et al.* v. *U. S.*, contains no allegations as to the physical impossibility of pipe lines serving as common carriers.

No. 481, The Ohio Oil Co. v. *U. S.*, contains only the allegation that compliance with the order would cause—

> great loss to petitioner because the transportation through its pipes of oils of varying grades and gravities would produce a large amount of contamination, with a resulting substantial depreciation in the quality and value of the oil belonging to your petitioner. (R. 5.)

Admitting, for argument, that injurious contamination would result from *any* mixture, a rate, or a scheme of

differentials, that would repay petitioner for the injury to his oil would be a reasonable regulation, and petitioner does not, and could not, deny its commercial practicability.

No. 482, Standard Oil Co. v. U. S.

Allegations as to impossibility identical with those in No. 481, *supra* (see R. 8), except that the words "grades and gravities" are qualified by the expression "*widely* different." It would seem, therefore, that in addition to the contamination charge which we suggested in No. 481, the Standard Oil Co. might further protect itself by regulations which would exclude *too* "*widely* different grades and gravities" altogether, or set apart special lines for special grades of oil.

[fol. 965] *No. 483, Standard Oil Co. of Louisiana v. U. S.*

Allegations identical with those of the Standard Oil Co., No. 481, *supra*. (R. [illegible])

The various reasons which the appellees assign for asserting that the act requires impossibilities are quite of a piece with the carefully timed transfer by the New York Transit Company and the National Transit Company of the discharging ends of their lines to the Standard Oil Company of New Jersey. If impossibilities and inconveniences exist they are in large part due to the appellees themselves and to the efforts they are making to escape the operation of the law.

III. Nothing in the Constitution prohibits the adoption by Congress of this means, so found to be in fact reasonable and appropriate to the accomplishment of its purpose.

The Constitution provides (Article I, Section 8) that:

> The Congress shall have power • • • To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

This act is, in fact, as we have shown, "necessary and proper for carrying into execution" the power to regulate interstate commerce, and therefore, under the clear rule established ever since *McCullough* v. *Maryland*, 4 Wheat. 315, *supra*, it must be held valid unless it violates some

[fol. 966] prohibition elsewhere explicitly made in the Constitution.

Two explicit prohibitions, both in the Fifth Amendment were urged by the petitioners below:

(1) The due process clause.

(2) The clause against taking private property for public use, without just compensation.

We regard it as thoroughly established by the decisions of this court that neither of these clauses is violated by such a statute as this.

(1) The Act is not in violation of the due process clause

The due process clause does not prevent Congress from regulating commerce by prohibiting a kind of commerce harmful to the public. *Hoke* v. *U. S.*, 227 U. S. 308; *The Lottery Case*, 188 U. S. 358. Nor does it limit the power to regulate commerce to the protection of health, morals, and order. It may be exerted for purely economic purposes whenever the strong, preponderant public opinion believes that there is a great public need. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *C. B. & Q. R. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592, and the Anti-trust and other cases, *supra*.

(a) *In many instances regulations of interstate commerce have been upheld which take the form of prohibition except upon such terms as would protect the public welfare.*

These have been held constitutional even though compliance with the condition has incidentally resulted in great [fol. 967] expenditure of money, or the uncompensated restriction of what had theretofore been a legitimate use of property.

The *Commodities Case, U. S.* v. *Del. & Hudson Co.*, 213 U. S. 366, is directly in point. It was there held that Congress could prohibit common carriers from carrying their own coal, despite the fact that many of the companies affected had invested enormous sums of money in the business of mining prior to the passage of the law. There is no substantial distinction between that case and the present. In both the motive of Congress was the same—to prevent an unconscionable use of an advantage in the means of transportation. In the one case the owner of a

railroad is forbidden to carry his own coal—unless he first parts with ownership; in the other the owner of a pipe line is forbidden to carry his own oil—unless he transports also the oil of others for reasonable compensation. The same reasoning which supported the one supports the other also.

In *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, Mr. Justice Lurton, upholding the constitutionality of the Carmack Amendment, said:

> The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests (p. 202). • • • The requirements that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiv- [fol. 968] ing packages destined to places beyond their own terminal, *should be required as a condition of continuing in that traffic* to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation (p. 203).

And in *Norfolk & Western Ry. Co.* v. *Dixie Tobacco Co.*, 228 U. S. 593, the same law was held properly applicable to a case where the initial carriers had never held themselves out as "receiving packages destined to places beyond their own terminal," *i. e.*, as a condition of engaging in interstate commerce they were forced to become insurers of the goods long after their own connection with them had entirely ceased.

A third case closely in point is *Southern Ry.* v. *Reid*, 222 U. S. 424, 438, where this court upheld the provisions in the act to regulate commerce which forbid any railroad subject to the act to engage in interstate commerce *unless* its rates have first been filed with the Commission. This again was to prevent one set of shippers from obtaining unconscionable advantages over others. Discriminations were not illegal at the common law. A shipper's only right was the right to reasonable rates. Discriminations were forbidden under the act to regulate commerce because it is for the public interest that all shippers shall have equal opportunities, and this although many valuable contract rights

were thereby destroyed, as in the *Mottley* case, 219 U. S. 467, and the *Armour* case, 209 U. S. 56.

[fol. 969] (*b*) *It is immaterial that the condition is not expressed, but implied.*

In the case of *Noble State Bank* v. *Haskell, supra,* the act which this court interpreted as going "from regulation to prohibition except upon such conditions as it may prescribe" (219 U. S. 113), was *not in terms* conditional. The same is true of the Carmack Amendment, 34 Stat. 584, 595, which in the *Atlantic Coast Line* case, was held to require interstate carriers:

> * * * *as a condition of continuing in that traffic* to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies. (219 U. S. at 203.)

(*c*) *Nor is this sort of regulation confined to industries "affected with a public interest" in the technical sense.*

The court below attempted to distinguish the pipe lines from cases affecting common carriers on the ground that their owners had not "devoted their property to a use in which the public has an interest." (No. 481; R. 110.) Such a distinction regards form and ignores substance. The public has an interest in *any business which substantially affects the interests of the public,* and any individual acts of any nature whatsoever may be regulated within constitutional limits to the extent that they affect the public.

As well might the Standard Oil Co. have urged that it was not subject to the antitrust law because it had not [fol. 970] devoted its property to public use in the public service sense.

Of course the power to regulate commerce is not limited in its operation to public service corporations.

In *Noble State Bank* v. *Haskell,* 219 U. S. 104, and *Engel* v. *O'Malley,* 219 U. S. 128, it was held that a State may regulate the business of banking, and that regulations may go to the extent of *prohibition except under conditions* that will safeguard "the primary conditions of successful commerce," or prevent the unscrupulous exploitation of a defenseless class of poor immigrants. In the language of Mr. Justice Holmes in the *Haskell case, supra:*

> It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v.

U. S., 167 U. S., 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that *both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce* * * * (p. 111).

It is not answered by citing authorities for the existence of the right (to engage in banking) at the common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We can not say that the public interests to which we [fol. 971] have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control.

On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe (p. 113).

True, these bank cases arose under State laws, but the power of the Federal Government over interstate commerce, as limited by the Fifth Amendment, is practically the same, for the purpose of this case at least, as the power of a State over intrastate commerce as limited by the Fourteenth. Furthermore, the case against the pipe lines is stronger than that against the banks, because the banking business has no inevitable tendency to monopoly.

In *Mugler* v. *Kansas*, 123 U. S. 623, 669, it was held that a state may prohibit the manufacture of intoxicating liquors, although incidentally great amounts of mill property whose chief value consists in its fitness for such purposes is thereby practically destroyed. It may prohibit such manufacture *even for the maker's own use*, if it regards that as essential to the successful enforcement of the chief purpose of the act.

The power which the States have of prohibiting such use by the individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and consistently with the existence and safety of organized society can not be—burdened with the condition that the State must compen-

sate such individual owners for pecuniary losses they [fol. 972] may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

It is true, that, when the defendants in these cases purchased or erected their breweries the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance or come under an obligation that its legislation upon that subject would remain unchanged.

In *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, it was held that a state might constitutionally prohibit anyone from permitting gas or oil to escape from his well into the open air for more than two days after it was struck. The court, basing its decision on the peculiar nature of the substances in question, said, speaking through the present Chief Justice:

> They have no fixed *situs* under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of *self-transmission*. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore operates upon the other surface owners. * * * (p. 202-203.)
>
> Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which [fol. 973] it is to be exerted, *can be manifested for the purpose of protecting all the collective owners, by securing a just distribution*, * * * (p. 210).

A still stronger case is *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, which followed *Ohio Oil Co.* v. *Indiana*, *supra*, and held that a state statute forbidding the pumping of mineral water at Saratoga Springs for the purpose of extracting gas alone, was constitutional because, the proportion of gas being small, it furnished an

incentive for pumping an excessive amount of the water in derogation of the rights of other co-proprietors upon adjacent lands.

Suppose some great corporation, desiring to exploit its oil lands in the shortest possible time, should at great expense install pumping machinery so powerful that it could rapidly draw away the entire common reservoir. Such a thing was held to be unlawful in the case of percolating waters even at common law. (*Forbell* v. *City of New York*, 164 N. Y. 522, 526; see also, *Kansas* v. *Colorado*, 206 U. S. 46.) Clearly a statute could forbid the pumps to be used (*Manufacturers Gas etc. Co.* v. *Indiana Natural Gas Co.*, 155 Ind. 461; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 262) and if their use could be prohibited why could it not also be prohibited except upon condition that the owner should give to the adjacent proprietors an equitable proportion of their common property.

This comes very close to our problem. True, a pipe line is not a pump, but its effect is practically the same. What [fol. 974] is the difference between being able to raise oil infinitely faster than anyone else, and being able to transport it infinitely cheaper than anyone else? The man who is not rich enough to own a pipe line must either stand by and see his share in the joint property entirely appropriated by his more fortunate neighbor, or he must *sell* his share under conditions where freedom of contract is wholly out of the question. The Pipe Line Amendment, like the Indiana Statute, *supra*, is "for the purpose of protecting all the collective owners by securing a just distribution." It liberates the industry by freeing the producer of the raw material from that unjust duress which inevitably *restrains* interstate commerce, and, as the Government maintains, *tends always toward monopoly.*

(d) Nor is the law violative of the due process clause in that, being general in its terms, it might cover any pipe lines which are not public markets for oil.

All of the Standard Lines, which were 90 per cent of the whole mileage, bought the greater part of their oil from other well owners in the same field. So did most, if not all, the other pipe lines. In regard to the companies

involved in this case the court below made the following findings:

Standard Oil Company:

> The record indicates that much the greater part of the oil, and perhaps all of it, is oil which this company has purchased. (No. 481; R. 97.)

[fol. 975] *Standard Oil Company of Louisiana:*

> It purchases a considerable part of the crude oil which its lines transport. (No. 481; R. 97.)

The Ohio Oil Company:

> It is an extensive purchaser of crude oil from other producers. (No. 481; R. 97.)

Robert D. Benson et al.:

> The greater part of the crude oil transported by this company is purchased from other producers. (No. 481; R. 96.)

The Prairie Oil & Gas Company:

> * * * its own wells yield only about 12,000 barrels per day and it purchases approximately 70,000 barrels per day on the average. (No. 481; R. 95.)

The Uncle Sam Oil Company:

> The extent to which this company purchases oil from other producers, if it engages in that business at all, does not appear from the record. (No. 481; R. 96.)

There is no showing in this case that there existed at the time this amendment was passed, a single pipe line not engaged in buying oil from tributary small producers. Suppose, however, that one of these pipe lines should refuse to purchase this tributary output. The only practical recourse left to the small producers would be to sell to the pipe line companies the wells themselves or else stand helplessly by and watch the draining of the common pool. The pipe line owner may choose whichever course [fol. 976] he pleases, *buying oil or buying wells*, and in either case the small producer is equally at his mercy.

It is no wonder that Senator Lodge was able to say in the course of the long series of debates following his introduction of this measure:

> The small well owner, to whom there have been pathetic references this morning, has not yet made his objections known to me. I heard within 24 hours after the introduction of my first amendment, on May 28, from the Standard Oil Co. A representative of that company came to see me on the following day, and represented the uselessness and injustice of this amendment. I have had a great many letters from small oil owners, and I have had a great many letters from independent refiners in support of the amendment, and the objections suggested by the Senator from Maine and the Senator from West Virginia really do not touch the case. * * * (40 Cong. Rec. 6365.)

But even supposing, for the sake of argument, that somewhere some one could be found who possessed a pipe line through which he pumped only the output of his own well, all of which he used on his own premises for fuel or other purposes—the discovery of such an individual would not invalidate this law. Lawmaking bodies are forced to legislate in a broad way, to provide rules which will be reasonably workable, and they are permitted to consider the normal case, without providing for the exceptional instance. It is enough that purely private pipe lines are *generally* the means of unfair and oppres- [fol. 977] sive advantage tending toward monopoly. Whether the whole business must be stamped out or regulated in order to give the public adequate protection, is a matter of legislative discretion, as the following cases amply demonstrate.

The point is put beyond argument by the recent case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, in which Mr. Justice Hughes, announcing the holding of the court that a state, to render effectual its prohibition of the sale of malt liquors might also include within the prohibition beverages which were in themselves innocuous, said (p. 201):

> * * * It is also well established that, when a state exerting its recognized authority undertakes to sup-

press what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government.

See also:

Booth v. *Illinois*, 184 U. S. 425.
Lemieux v. *Young, Trustee*, 211 U. S. 489.
Powell v. *Pennsylvania*, 127 U. S. 678, 685.
Silz v. *Hesterberg*, 211 U. S. 31.
Commonwealth v. *Gilbert*, 160 Mass. 157.
Knoxville Iron Co. v. *Harbison*, 183 U. S. 13.
The Slaughter House Cases, 16 Wall. 36.

[fol. 978] *The Pure Food Law*, 34 Stat. 768-770, prohibits the sale for food of any animal which "died otherwise than by slaughter," though the steer which was killed by a train, or accidentally shot, would be perfectly wholesome. Many other sections of the same law similarly include prohibitions which might cover harmless, inoffensive, and nonfraudulent food products.

It is unnecessary to go further. These instances from the great multitude of others show conclusively that where certain acts are *ordinarily* attended with public danger the legislative power is not prevented from prohibiting such acts altogether if in its judgment that is the most feasible way of eradicating the evil.

(2) Nor does the Act violate the prohibition against taking property for public use without compensation.

Congress has done two distinct things here: (*a*) it has prohibited the private operation of oil pipe lines in interstate commerce, and (*b*) it has subjected all pipe lines elected to be operated in interstate commerce to the public use as common carriers.

(*a*) *As to the prohibition of private operation, there is not a taking.*

It is merely the prohibition of a noxious agency of interstate commerce, *i. e.*, the private, monopolistic, operation

of pipe lines. There is no vested right in a noxious use of property. If there had been, the *Standard Oil Trust Case* could not have been decided as it was.

[fol. 979] In *Mugler* v. *Kansas*, 123 U. S. 623, 669, it was held that a State might prohibit the manufacture of intoxicating liquors, although incidentally great amounts of mill property whose chief value consisted in its fitness for such purposes was thereby practically destroyed.

In the *Commodities Case*, 213 U. S. 366, the court dismissed:

> * * * summarily * * * all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause * * * because obviously mere suggestions of inconvenience or harm are wholly irrelevant * * * (p. 405).

In the *Noble State Bank* case, *supra*, the Oklahoma Bank Guaranty Law was upheld although as Mr. Justice Holmes said:

> * * * there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. (220 U. S. 110.)

See also:

Union Bridge Co. v. *U. S.*, 204 U. S. 364.
The Slaughter House Cases, 16 Wall. 36.
L. & N. R. Co. v. *Mottley*, 219 U. S. 467.
C. B. & Q. R. Co. v. *Drainage Commissioners*, 200 U. S. 561, 592.

(b) But it may be said that in so far as the owners elect to operate the lines under the condition, there is, of course, a "taking" in the subjection to the quasi public use as common carrier. The thing so taken, is however, only the compensated, occasional use of the pipe line.

[fol. 980] There is no change of title—no shift of possession—not even the acquisition of a permanent easement. An adjoining well owner, if he complies with reasonable regulations, may have his oil poured into the pipe and propelled to the other end. For that he must pay a reason-

able rate. When the reasonableness of that rate is called in question the courts will make sure that the pipe line owner is adequately compensated. That question is not open at this time, however.

Two cases very clearly illustrate our meaning. In *Otis Co.* v. *Ludlow Co.*, 201 U. S. 140, the Court upheld the Massachusetts mill act. This gave the builder of a dam the right to flow the lands of upper riparian proprietors. The only provision for compensation was a right to sue the dam owner in tort for the damages actually done. Thus compensation was not even secured in advance, although the flowing of land has been held by all courts to be a "taking." (*Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.)

In *L. & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 150, the court refused to uphold a statute of Kentucky compelling one railroad to surrender its cars to another without security for their return. Mr. Justice McKenna, speaking for the minority of the court, laid down the principles which must govern these cases in language that is none the less valuable because the majority differed in their application of those principles to that particular case. Relying on the *Ludlow* case, *supra*, he said (p. 150) that the [fol. 981] exigencies of the case in hand did not require the court to decide whether the power there exercised was the police power or eminent domain; if the former, no compensation was necessary; if the latter, the right of the carrier to sue for any damage resulting (as in the *Ludlow* case), *together with the right to charge for the use actually taken, was sufficient.* The majority, however, were of opinion that as an exercise of the police power it was unreasonable, and as a taking the provisions for compensation were *not* sufficient.

The dividing line between the two cases is suggested by Mr. Justice Holmes in the *Ludlow* case, where he said—

> As no title is gained to have the water on the upper land, the dam owner *pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified* than could be sustained when the title is lost. So far as security goes, *looking to the reasonable probabilities in such cases*, it would seem to be sufficient (p. 153).

It is apparent, then, that "somewhat less elaborate provisions" for compensation may be justified in some cases than in others—all that is necessary is that "looking to the reasonable probabilities in such cases," they shall be reasonably sufficient. And the transfer of possession is one of the circumstances for consideration.

This being so, the *Pipe Line Cases* fall rather within the rule of the *Mill Acts* than of the *Stock Yards* case. In the [fol. 982] *Stock Yards* case the railroad wholly relinquished the possession of its cars. Here the owner never gives up possession of the pipe lines. There the railroad was compelled to trust to the uncertain solvency of other companies and the pitfalls of litigation to recover his compensation in case of loss. Here his only loss is the use of his pipes by the oil of others. The compensation for that loss is the rate paid. That rate is a reasonable rate, and its payment is doubly secured—first by the immemorial right of the carrier to demand prepayment for his services, and, second, by the lien which he has upon the oil carried whereby he may insure payment before delivery. This makes his position even stronger than that of the upper riparian owner in the *Mill Acts* case, for there he was driven to an action of tort to collect his compensation, whereas the pipe-line owner is absolutely certain of his compensation at all times.

The case is analogous also to *Clark* v. *Nash*, 198 U. S. 361, where the court upheld a statute giving individual owners of arid lands in Utah the right to bring water through their neighbor's irrigation ditches. True, the statute provided for payment in advance for the perpetual easement acquired, but the expense of *maintaining* the ditch (which with the increased flow of water would presumably be greater) was to be paid from time to time as occasion arose, and no security was given for that. (Decree of the Utah Court given at p. 365.) Nor is there any intimation that if no permanent easement in the soil had been [fol. 983] taken the requirements of the case would not have been equally satisfied by payments for the use of the ditch as from time to time it should be actually used. Indeed, the inevitable conclusion from the statement of Mr. Justice Holmes in the *Mill Acts* case quoted, *supra*, is that such a provision for compensation would have been sufficient.

For the reasons thus assigned it is submitted that the decrees of the court below should be reversed, the injunctions dissolved, and the several petitions dismissed.

John W. Davis, Solicitor General.

September 22, 1913.

[fol. 984] APPENDIX

Statutes of Various States With Reference to Pipe Lines

(Ante p. 62)

Arkansas

The Supplement to Kirby's Digest, Statutes of Arkansas, 1911, pp. 253, 254, title "Eminent Domain—Oil and Gas Companies" (acts 1905, act 228; in force May 2, 1905), provides:

Sec. 2991a. Any corporation organized by virtue of the laws of this state, for the purpose of developing and producing mineral oil, or petroleum, or natural gas in this state, and marketing the same, or transporting or conveying the same by means of pipes from the point of production to any other point, either to refine or to market such oil, or to conduct such gas to any point or points to be used for heat or lights, may construct, operate, and maintain a line or lines of pipes for that purpose along and under the public highways and the streets of cities and towns, with the consent of the authorities thereof, or across and under the waters and over any lands of the state, and on the lands of individuals, and along, under, or parallel with the rights of way of railroads, and the turnpikes of this state; provided, that the ordinary use of such highways, turnpikes, and railroad rights of way be not obstructed thereby, or the navigation of any waters impeded, and that just compensation be paid to the owners of such lands, railroad rights of way, or turnpikes, by reason of the occupation of such lands, railroad rights of way, or turnpikes by said pipe-line or lines.

[fol. 985] Sec. 2991b. In the event any such company shall fail upon application to individuals, railroads, or turnpike companies to secure such right of way by consent, contract or agreement, then such corporation shall have the right to

proceed to procure the condemnation of such property, lands, rights, privileges, and easements in the manner now provided by law for taking private property for right of way for railroads as provided by section 2947 to section 2958, inclusive, of Kirby's Digest.

Sec. 2991c. Whenever any such corporation shall desire to construct such pipe-line or lines upon or under the lands of individuals, or right of way of any railroad, or any turnpike, said corporation, by its agents, shall have the right to enter peacefully upon said lands or rights of way and survey, locate and lay out its said pipe-lines thereon, being liable, however, for any damage that may result by reason of such acts, and shall designate on a plat or map to be made and filed with the county clerk of the county, the width of the strip of land needed to be condemned for its purposes, its location, and the depth to which such pipes are to be laid.

Sec. 2991d. Any person or persons who shall injure or molest any such pipe or pipes so used for the transportation of such oil or gas, shall be guilty of a misdemeanor, and on conviction be fined in any sum not to exceed two hundred dollars; but should such injury be done wilfully, and be of such a character as to cause such pipes to be so damaged that such oil or gas shall escape and cause damage either to the company or individuals or other corporations, then such person or persons shall be guilty of a felony, and on conviction thereof shall be fined not to exceed one thousand dollars and confined in the penitentiary not more than five years.

[fol. 986] California

Pomeroy's Codes of Civil Procedure of the State of California, 1901, Title VII (act of 1891), "Eminent Domain," 692, provide:

1237. *"Eminent domain" defined.*

Sec. 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

1238. *Eminent domain may be exercised, on behalf of what uses.*

Sec. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. * * * * *

2. * * * * *

3. * * * * *

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads; paths and roads either on the surface, elevated or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric and horse railroads, canals, ditches, dams, pondings, flumes, aqueducts and pipes, for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. * * * * *

6. * * * * *

7. Telegraph lines.

8. * * * * *

9. * * * * *

10. Oil Pipe Lines.

11. * * * * *

12. * * * * *

13. * * * * *

[fol. 987] Colorado

Revised Statutes of Colorado, 1908, Chapter XLV (act of 1891), title "Eminent Domain," 689, provide:

2436. *Pipe line companies—Rights of way.*—Sec. 22. Any foreign or domestic corporation organized or chartered for the purpose, among other things, of conducting or maintaining a pipe line for the transmission of power, water, air, or gas for hire to any mine or mining claim, or manufacturing, milling, mining, or public purpose, shall have the right of way for the construction, operation and maintenance of such pipe line or pipe lines, for such purposes, through any lands, without the consent of the owner thereof,

where such right of way is necessary for the purpose for which said pipe line shall be used. (L. '07, p. 283, Sec. 2)

* * * * * * *

2439. *Common Carriers—Fees.*—Sec. 25. Any such corporation or corporations, organized or chartered for any or all of the purposes hereinbefore mentioned shall be deemed a common carrier or common carriers and shall fix and charge only a reasonable and uniform rate to all persons who desire the use of any such tunnel, pipe line, electric power transmission line or aerial railway. (L. '07, p. 284, Sec. 6)

* * * * * * *

2441. *Compensation for rights of way.*—Sec. 27. Any such corporation shall make due and just compensation for such right of way to the owners of the property through which it is proposed to construct, operate and maintain such tunnel, pipe line, electric transmission line, or aerial tramway, and when the parties cannot agree upon such right of way and the amount of compensation to be paid the owner of such property, the same shall be determined in manner as [fol. 988] now provided by law for the exercise of the right of eminent domain. (L. '07, p. 284, Sec. 7)

* * * * * * *

2461. *Companies that may condemn rights of way.*—Sec. 47. If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line or railroad line, shall be unable to agree with the owner, for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for the right of way or any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right of way, or easement or other right, in the manner provided by law for the condemnation of real estate or right of way, and any ditch, reservoir, or pipe line company may in the same manner condemn and acquire the right to take and use any water not previously appropriated. (L. '91, p. 98, Sec. 3, amending G. S., Sec. 338; G. L. Sec. 304.)

[fol. 989] Illinois

The Legislature of Illinois in 1913 passed an act entitled "An Act to Provide for the Regulation of Public Utilities," to take effect and be in force on and after January 1st, 1914, which provides *inter alia:*

Sec. 10. *Definitions.*—Unless otherwise specified, the word "commission," when used in this Act, means the State Public Utilities Commission of Illinois, which is created and established under the provisions of this Act.

The term "commissioner," when used in this Act means one of the members of the commission.

The term "public utility," when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter:

(a) May own, control, operate or manage, within the State, directly or indirectly for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph or telephone messages between points within this State; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water; *or for the conveyance of oil or gas by pipe line;* or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger; * * *

* * * * * * *

[fol. 990] Sec. 50. *Additions and New Structures—Joint Construction.*—Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs,

improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order: * * * :

Sec. 59. *Eminent Domain.*—When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under sections 50 or 58 or Subdivision two (2) of section 81 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

[fol. 991] Indiana

Burns' Annotated Indiana Statutes, Revision of 1908, Vol. 2, Chapter 40 (act of 1891), title "Corporations—Manufacturing and Mining Companies," 583, provide:

5148. (5112) *Pipe line companies—Organization.*—1. Whenever three or more persons desire to form a company to lay on, over or underneath the ground, iron pipes or tubes, to erect pumps and pump stations and tanks for storing oil, and also to erect telegraph lines along said line or lines of pipe, and to carry on by means thereof the business of transporting and storing petroleum, they shall make, sign and acknowledge before some officer capable to take acknowledgments of deeds, a certificate in writing which shall state the corporate name adopted by the company, the object of its formation, the amount of capital stock, the term of its existence (not, however, to exceed fifty years), the number of directors and their names, who shall manage the affairs of such company for the first year, and the names of the counties in which its operations are to be carried on, and the county where its principal office shall be located, and file the same in the office of the recorder of such county, which shall be placed upon the record, and a duplicate thereof in the office of the secretary of state.

5156 (5120) *Seal—May hold real estate.*—9. Such company shall have a common seal and the same alter or change at pleasure. It shall have power to acquire, by purchase or otherwise, hold and convey such real estate and personal estate as may be necessary and proper for the purpose of erecting and keeping in repair its lines of pipes and telegraph and tanks and buildings requisite for their operation. [fol. 992] Said corporation may continue for a time not exceeding fifty years. Such corporation shall have power

to acquire such real estate and rights of way as may be necessary for the uses and purposes herein contemplated, in the mode provided in the act approved February 20, 1889, authorizing natural gas companies to appropriate and condemn real estate as fully as if all that part of said act following the first paragraph of the first section and excluding the seventh section were incorporated and made a part hereof.

5159 (5122a) *Oil companies acquiring lands.*—1. That all companies, corporations and voluntary associations now organized under the laws of the state of Indiana, or which may hereafter be organized thereunder, for the purpose of laying on, over or underneath the ground, iron pipes or tubes, to erect pumps and pump stations and tanks for storing oil, and for the transportation of oil shall have power to acquire real estate for the use of such companies, corporations and voluntary associations in the mode and manner provided hereafter in this act.

5160 (5122b) *Acquiring easement in lands.*—2. Whenever any such company, corporation or voluntary association is unable to agree with the owner or owners about the purchase of any real estate in any county, desired for the construction of its trenches or the laying of the mains and the connecting of its pipe lines or on which to erect pumps and pump stations and tanks for storing oil, or on which to construct telegraph and telephone lines, it shall have the right to acquire an easement in and upon the same for each and all the purposes above mentioned, and in the manner and by the special proceedings prescribed in this act.

5161 (5122c) *Appropriation of lands*—Proceedings.—3. Such companies, corporations or voluntary associations as are mentioned in section one (1) of this act, shall have the right and are hereby authorized to enter upon any land for the purpose of examining and surveying its line for trenches [fol. 993] and pipe lines, and telegraph and telephone lines, and a location for pumps and pump stations and tanks for storing oil, and may acquire an easement in and upon so much thereof as may be deemed necessary for its said trenches, pipe lines, telegraph and telephone lines, not exceeding one rod width for any single pipe line, and not exceeding one rod width for any single telegraph or telephone line, and for such easement in real estate as is neces-

sary for the location of such pumps and pump stations and tanks for storing oil. * * *

[fol. 994] Kansas

Dassler's General Statutes of Kansas, 1909, chapter 48 (act of 1905), Article IV, title "Transportation of Oil," provide:

An Act Relating to the Transportation of Oil by Means of Pipe Lines

Be it enacted by the Legislature of the State of Kansas:

Sec. 1. All pipe lines laid, built, or maintained for the conveyance of crude oil within the State of Kansas are hereby declared to be common carriers and said conveyance of said oil shall be in the manner and under the restrictions in this act provided.

Sec. 2. It shall be the duty of every person, firm, association, or corporation operating under such pipe line to provide suitable and necessary receptacles for receiving such oil for transportation and for storage at the place of delivery until the same can be reasonably removed by the consignee, and shall be liable therefor from the time the same is delivered for transportation until a reasonable time after the same has been tranported to the place of consignment and ready for delivery to the consignee. It shall be the duty of every such person, firm, association, or corporation to receive and forward such oil as shall be offered for shipment in the order of application therefor, upon the applicant's complying with the rules herein provided for as to the delivery and payment for such transportation. Such common carrier shall issue to the shipper a certificate showing the actual quantity and specific gravity thereof; but no application for such transportation shall be valid beyond or for a greater quantity than the applicant has ready for delivery at the time of making such application.

Sec. 3. It shall be unlawful for any such person, firm, association, or corporation to charge for the transportation [fol. 995] of such crude oil through its line in excess of the following rates for each barrel of forty-two gallons transported: Six miles and less, five cents; over six miles and not more than fifteen miles, six cents; over fifteen miles and not more than forty miles, seven cents; over forty miles

and not more than eighty miles, eight cents; over eighty miles and not more than one hundred miles, ten cents; over one hundred miles and not more than one hundred and fifty miles, fifteen cents; over one hundred and fifty miles and not more than two hundred miles, twenty cents; over two hundred miles and not more than two hundred and fifty miles, twenty-three cents; over two hundred and fifty miles and not more than three hundred miles, twenty-five cents.

Sec. 4. The State board of railroad commissioners shall have the general supervision and control over all such persons, firms, associations, or corporations in the performance of said business, and shall prescribe reasonable rules for the conduct thereof, which rules, when prescribed and delivered in writing to any such person, firm, association, or corporation, shall be printed and posted up in a convenient, accessible, and conspicuous place at each office, station, or place of business where such oil is received or delivered. The State board of railroad commissioners is hereby authorized to prescribe reasonable maximum rates, not exceeding the rates set forth in section 3 hereof, which shall be charged for the transportation of such oil, which rate shall be binding on every such person, firm, or association, or corporation after its publication in the official State paper: *Provided*, The reasonableness of such rates may be tested by proceedings therefor in any court of competent jurisdiction in this State, and such court shall, upon hearing the same, make such order as shall be proper, and such order may be reviewed by the supreme court as other civil proceedings, regardless of sum or value involved: *Provided*, Before beginning such proceedings in court to [fol. 996] test such matters such person, firm, association, or corporation shall execute a bond to the State of Kansas in such reasonable sum as the judge of the court in which such matter is brought shall order, conditioned that the person, firm, association, or corporation making such application will promptly pay to any shipper the difference between the rate received for transporting oil and the rate finally ordered by such court. When such maximum rates shall be fixed by the State board of railroad commissioners, the rates prescribed in section 3 of this act shall cease to be of force, and the rates so fixed by the State board of railroad commissioners shall govern, as in this section provided.

Sec. 5. Any such person, firm, association, or corporation, which shall fail or refuse to accept, transport, and deliver oil when offered up to the full capacity of such pipe line, at rates not to exceed those provided for by this act, or shall fail, neglect, or refuse to obey any rule so established by the State board of railroad commissioners, shall be liable to the person injured by such failure or refusal in the sum of five hundred dollars liquidated damage, together with reasonable attorney's fees, to be fixed by the court, in case suit shall be brought therefor; such liquidated damages and attorney's fees to be recovered in any court of competent jurisdiction; and in case of any corporation so refusing or failing, the charter board is hereby authorized to revoke the charter or permit to do business in this State of such corporation.

Sec. 6. This act shall take effect and be in force from and after its publication in the official State paper.

The said act was approved February 22, 1905.

[fol. 997] Kentucky

Carroll's Kentucky Statutes, 1909, Chapter 93A (act of 1900), title "Oil and Gas—Condemnation of Land For" provide:

Sec. 3766*h*. *Condemnation of land for.*—All corporations or companies organized for the purpose of constructing, maintaining or operating oil or gas well or wells or pipe line or lines for conveying, transporting or delivering oil or gas, or both oil and gas, are hereby vested with the right and power to condemn lands and material in this Commonwealth or the use and occupation of so much thereof as may be necessary for constructing, maintaining and operating such pipe line, or lines, and all necessary machinery, pumping stations, appliances and fixtures, including tanks, telephone and telegraph lines, for use in connection therewith, together with rights of ingress and egress to examine, alter, repair, maintain and operate or remove such pipe line or lines, all such being hereby declared to be a public use; and when any such corporation or company desires to construct oil or gas pipe line or lines, or both, for the purpose of conducting, transporting or delivering oil or gas, or both, over the lands of others, shall

be unable to contract or agree with the owner or owners of land or material necessary for its use for said purposes, it may, in the mode prescribed for the condemnation of land for railroads, condemn the use of so much of said land as may be necessary for the purpose of constructing, maintaining and operating such pipe line or lines, and all necessary machinery, pumping stations, appliances and fixtures, including necessary tanks, telephone and telegraph lines, and including rights of ingress and egress to examine, alter, repair, maintain and operate or remove the same.

[fol. 998] Louisiana

The acts of the State of Louisiana, 1906, page 54, Act No. 39, approved June 29, 1906, provide:

> An Act Relative to corporations, domestic and foreign, organized with the power to build and construct pipe lines for transportation of oil and gas, or either, giving such corporations, under certain terms, the right of expropriation, rights of way under and across all public lands and across streams and other public waters, and rights of way along, across and under public rural highways and roads, and streets and public places of cities and towns with the consent of and upon terms imposed by the local authorities having jurisdiction thereof, and declaring all corporations exercising the powers, herein contained, to be common carriers.

Section 1. *Be it enacted by the General Assembly of the State of Louisiana:* That corporations, whether domestic or foreign, organized with the power of constructing and operating pipe lines for the transportation of oil or gas, or either, shall have the right to expropriate rights of way for such pipe lines and for telegraph, and telephone lines incident to the operation of such pipe lines and lands for tank and pumping stations, making part of such lines, or of storage stations connected therewith, and necessary to the purpose thereof.

Section 2. *Be it further enacted, etc.*, That said right of expropriation shall be exercised in the same manner, and by the same proceedings, and under the same limitations now imposed by law on railroads and other quasi-public corporations.

Section 3. *Be it further enacted, etc.*, That said corporations shall have a right of way not exceeding ten (10) feet wide for the laying of their pipe lines under and across all public lands of the State.

Section 4. *Be it further enacted, etc.*, That such corporation shall have the right, with their pipe lines to cross all public streams and waters of the State, but in such case [fol. 999] the lines shall be so constructed as not to impede or interfere with the navigation thereof, if such streams and waters are navigable, nor with the drainage through said streams and waters, whether navigable or not.

Section 5. *Be it further enacted, etc.*, That said corporation shall have the right to lay and maintain its pipe lines along, under and across all public rural highways and roads and along, under and across all streets and public places in cities and towns, with the consent of the local authorities having jurisdiction or control thereof, and upon such terms as such authorities may impose.

Section 6. *Be it further enacted, etc.*, That the right conferred by this law upon any such corporation to lay its pipe lines under and across public lands and along and across public highways, streams and waters and streets upon the terms stated, shall also permit said corporation availing itself of such right, to construct and maintain along the route of such pipe lines, telegraph and telephone lines incident to the operation of such pipe lines.

Section 7. *Be it further enacted, etc.*, That no such corporation shall have power to exercise any right of expropriation herein conferred, until it shall have filed with the Secretary of State, a resolution of its Board of Directors, duly certified under its seal, consenting and agreeing that said corporation shall be a common carrier of either gas or oil or both, and that it shall and will transport that product whereof it has declared itself a common carrier, for all persons and corporations up to the capacity of its pipe line, without discrimination or preference.

Act No. 36 (*id.* p. 52), also approved June 29, 1906, declaring pipe lines common carriers, etc., provides:

Section 1. *Be it enacted by the General Assembly of the State of Louisiana*, That all pipe lines, through which

carrier thereof as at common law; and no such common carrier shall allow or be guilty of any unjust or unlawful discrimination, directly or indirectly, in favor of the carriage, transportation, storage or delivery of any crude, stock or storage oil, or any product thereof, in its possession or control, or in which it may be interested, directly or indirectly. (L. 1909, p. 427.)

SEC. 4313. *Who may have right of eminent domain.*—All persons, natural, or artificial, except foreign corporations, shall have the right of eminent domain, and any right or privilege hereby conferred, when necessary, to make effective the purposes of this article and the rights thereby conferred. Foreign corporations organized under the laws of any other State or the United States, and doing or proposing to do business in this State, and which shall have become a body corporate pursuant to or in accordance with the laws of this State, and which, as hereby provided, shall have registered its acceptance of the terms hereof, shall receive all the benefits provided by this article. (L. 1909, p. 429.)

[fol. 1012] Pennsylvania

Pepper and Lewis's Digest, 1910, Vol. 1, page 1903 (act of 1872), title "Pipe Line Companies," provides:

458. *Incorporation prior to 1874.*—The provisions of an act relating to corporations for mechanical, manufacturing, mining and quarrying purposes, approved July 18, 1863, and the supplements thereto, be and the same are hereby extended to the transportation and storage of petroleum in the counties of Venango, Warren, Forest, Armstrong, Clarion, Butler, Crawford, and Erie; and that any company organized for such purposes, under the provisions of said act, shall have the right to transport, store, insure and ship petroleum, and for that purpose to lay down, construct and maintain pipes, tubing, tanks, offices and such other machinery, devices or arrangements as may be necessary, and to enter upon, use and occupy such lands as may be requisite for the purposes of the company; and for rights of entry upon lands, rights of way and the use of materials necessary to the construction, maintenance and operation of said lines of pipes and fixtures as aforesaid, they shall be entitled to all the rights and privileges, and

be subject to all the limitations and restrictions of railroad companies, as contained in the act relating to railroad companies, approved February 19, 1849, and the supplements thereto: Provided, however, That nothing herein contained shall be construed to authorize the construction of any railroad.

459. *Incorporation under the act of 1874.*—(Companies may be incorporated for) the carrying on of any mechanical, mining, quarrying or manufacturing business including all of the purposes covered by the provisions of the act of general assembly, entitled "An act to encourage manufacturing operations in this commonwealth," ap- [fol. 1013] proved April 7, 1849, and entitled "An act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," approved July 18, 1863, and the several supplements to each of said acts, including the incorporation of grain elevators, storage warehouse and storage yard companies; and also including the storage and transportation of water, with the right to take rivulets and land, and erect reservoirs for holding water, and excluding the distilling or manufacture of intoxicating liquors; and companies may be organized under this act, having the right to transport, store, insure and ship petroleum, and for that purpose to lay down, construct and maintain pipes, tubing, tanks, offices, and such other machinery, devices or arrangements as may be necessary to fully carry out that right; and also with the right to enter upon, take and occupy such land and other property as may be requisite for the purposes of such corporations:

460. *Power to hold and convey real and personal estate.*—All companies incorporated or hereafter to be incorporated under the provisions of the act to which this is a supplement, for the purpose of the transportation and storage of oil, by means of pipe lines and tanks, for the public, shall have the power to take, hold, purchase and transfer such real and personal property as the purposes of the corporation may require, not exceeding the amount limited by its charter, together with the right to appropriate and take lands, easements and rights of way for locating and constructing steam pumps, tanks, pump houses, and offices, and laying down its pipes or tubes, connections and branches, from any point or points in any of the counties in which petroleum is produced, to any railroad, canal,

navigable river, port or city within this commonwealth, and for all necessary purposes of the corporation, including right to cross railroads, and the right to appropriate a right of way and locate its pipes or tubes, upon and over, under and across any lands, waters, streams, rivulets, roads, turnpike roads, canal or other public highway, not how [fol. 1014] ever, passing through any burying ground or place of public worship, or any warehouse, mill, manufactory, store or dwelling house, without the consent of the owner or owners thereof being first had and obtained: * * *

Pepper and Lewis's Digest, 1910, Vol. 3, page 6399 (act of 1907), title "Railroads and Canals," provides:

344. *Common carrier defined.*—The term "common carrier", as used in this act, shall apply to all corporations, or any person or persons, within the state, engaged in the transportation of freight or passengers by means of railroads or by water, or partly by railroad and partly by water, including electric railway companies, street railway companies, elevated railway companies, underground, elevated, or subway passenger railway companies, bridges and ferries, when used in connection with the transportation of freight or passengers upon any such railroad or railway; pipe-line companies engaged in the transportation of oil, either by means of pipe-lines, or by water, or partly by means of pipe-lines and partly by means of railroads or railways, or partly by means of pipe-lines and partly by means of water; sleeping- and drawing-room car companies engaged in transporting passengers upon any such railroad; express companies engaged in transporting property upon any such railroad, electric railway, street railway, or by water; and telegraph or telephone companies.

345. *Power commission to inquire into methods and facilities of carriers.*—The commission shall have power to administer oaths in all matters in relation to its duties, so far as necessary to enable it to discharge such duties. It shall have full power and authority to inquire into the management of the business of all common carriers, including freight and passenger rates and tariffs, the equitable distribution of cars, the granting of sidings and regulation of crossings, the location of freight and passenger-stations, the adequacy of facilities for the carriage and transporta-

tion of freight and passengers, the use and compensation [fol. 1015] for cars owned or controlled by persons other than the carrier, and, generally, all matters incident to the performance of their public duties, and their compliance with the provisions of their charters and the laws of the land.

346. *Persons discriminated against to make complaints—Commission to communicate with carrier—Decision.*—Any person, firm, corporation, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of any thing done or omitted to be done by any common carrier subject to the provisions of this act, in violation of law or of any decision, regulation, or recommendation of the commission, may apply to the commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same, in reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant, only for the specific violation of law complained of. If such common carrier shall not satisfy the complaint, within the time specified, and there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of, in such manner and by such means as it shall deem proper. Said commission may institute any inquiry of its own motion, in the same manner and to the same effect as though complaint had been made. No complaint shall, at any time, be dismissed because of the absence of direct damage to the complainant. The commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint as aforesaid, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act are [fol. 1016] unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any provision of law, or that any regulation or practice in respect to transportation is unjust, unfair, or unreasonable, and in violation of law, to decide and recommend

what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what regulation or practice in respect to transportation is just, fair, and reasonable to be thereafter followed.

Article I of the "Public Service Company Law" of the State of Pennsylvania, recently passed, provides:

Section 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same* That this act shall be known and may be cited as "The Public Service Company Law."

The term "Public Service Company" when used in this act includes all railroad corporations, canal corporations, street railway corporations, stage line corporations, express corporations, baggage transfer corporations, *pipe line corporations*, ferry corporations, common carriers, Pullman car corporations, dining car corporations, tunnel corporations, turnpike corporations, bridge corporations, wharf corporations, incline plane corporations, grain elevator corporations, telegraph corporations, telephone corporations, natural gas corporations, artificial gas corporations, electric corporations, water corporations, water power corporations, heat corporations, refrigerating corporations, sewage corporations doing business within this State and also all persons engaged for profit in the same kind of business within this Commonwealth, Provided however Such persons and corporations shall not be subject to the provisions of this act with respect to any business transacted or any property owned by them outside of the Commonwealth of Pennsylvania * * *.

[fol. 1017] The term "Facilities" as used in this act includes all plant and equipment of a public service company which includes all tangible real and personal property, buildings, materials, easements, rights of way, rights of trackage subways, tunnels, railroads, street railways, tracks, canals and all animals, locomotives, apparatus, appliances, devices, instruments, appurtenances, freight cars, refrigerator cars, baggage cars, express cars, passenger cars, drawing-room cars, parlor cars, sleeping cars, dining cars, rolling stock, carriages, cabs, hansoms, taxicabs, vehicles, boats, ships, vessels, bridges, barges, cables, conduits, con-

verters, transformers, condensers, wires, poles, structures, telegraph lines, telephone lines, crossbars, engines, machines, dynamos, boilers, motors, storage batteries, switch-boards, water falls, water-power stations, power stations, pumping stations, reservoirs, purifiers, oil tanks, gas tanks, holders, retorts, ducts, pipes, pipe galleries, *pipe lines,* mains, meters, lamps, scrubbers, wharves, piers, docks, ferries, incline planes, side tracks, spurs, turn outs, switches, systems, stations, depots, terminals, terminal facilities, water or gas jet wells, and any and all other means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for by or in connection with the business of any public service company: *Provided, however,* That no property owned by the Commonwealth of Pennsylvania or a municipality thereof at the date when this act becomes effective shall be subject to the Commission or to any of the terms of this act except as elsewhere provided herein.

[fol. 1018] Texas

Herron's Supplement to Sayles' Texas Civil Statutes, 1897-1906, chapter 15a (acts of 1899), page 104, title "Oil, Gas, Salt, etc., Corporations," provides:

Sec. 1. *Not less than three may organize.*—Any number of persons, not less than three, may organize themselves into a corporation for the purpose of storing, transporting, buying and selling of oil and gas, salt, brine and other mineral solutions in this State.

Sec. 2. *Method of organization.*—The manner and method of organizing such corporations shall be the same as provided by law for the organization of private corporations in chapter 2, title 21, of the Revised Civil Statutes of the State, and the provisions of this act shall apply to all corporations already organized for any of the purposes of this act.

Sec. 3. *Powers, etc.*—Such corporations shall have power to store and transport oil and gas, brine and other mineral solutions, and to make reasonable charges therefor; to buy, sell, and furnish oil and gas for light, heat and other purposes; to lay down, construct, maintain and operate pipe lines, tubes, tanks, pump stations, connections, fixtures, storage houses and such machinery, apparatus, devices and

gasses, oil or other liquids are conveyed from one point [fol. 1000] in the State to another point in the States, for a consideration, are hereby declared to be common carriers, and are placed under the control of and subject to regulation by the Railroad Commission of Louisiana.

Section 2. *Be it further enacted, etc.*, That the power and authority is hereby vested in the Railroad Commission of Louisiana, and it is hereby made its duty to adopt, change, or make reasonable and just charges or regulations to govern and regulate all pipe lines in this State, through which gasses or other liquids are conveyed from one point in the State to another point in the State for a consideration.

Section 3. *Be it further enacted, etc.*, That all laws or parts of laws inconsistent or in conflict with this Act be, and the same are hereby repealed.

[fol. 1001] Nebraska

Secs. 4575 and 4581, chapter 64, Compiled Statutes of Nebraska, 1911 (act of July 9, 1903), provide:

That any company, corporation, or association formed or created for the purpose of transporting, transmitting or conveying petroleum or other like oil, and desiring or requiring a right-of-way for the laying and maintaining of any pipe line or lines for such purpose within the State of Nebraska, and being unable to agree with the owner or lessee of any land, lot, or right-of-way on the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may reasonably be necessary for the laying, re-laying and maintenance of any such pipe line, shall have the right to acquire the same for such purpose, as hereinafter provided.

* * * *Provided, however*, that nothing contained in this act shall be construed as granting to any company, corporation or association, any right to obtain a right of way, within the corporate limits of any incorporated city or village.

[fol. 1002] New York

Birdseye's Cumming & Gilbert's Consolidated Laws of New York, 1909, Vol. 5, page 6311, Article VI (Laws of 1890), title "Pipe Line Corporations," provide:

Sec. 40. *Incorporation.*—Twelve or more persons may become a corporation for constructing and operating for

public use, except in the city of New York, lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products or property, or for maintaining and operating any line of pipe already constructed and owned by any corporation, person or persons, except in such city, for the public use, by making, signing, acknowledging and filing a certificate stating the name of the corporation, the number of years it is to continue, the places from and to which it is to be constructed or maintained and operated, its length as near as may be, the name of each county through or into which it is to be constructed; the amount of its capital stock, which shall not be less than fifteen hundred dollars for every mile of pipe constructed or proposed to be constructed, and the number of shares of which it shall consist; the number of directors not less than seven, and the names and places of residence of the directors for the first year, and the place of residence of each subscriber and the number of shares he agrees to take in such corporation, which must in the aggregate equal ten hundred and fifty dollars for every mile of pipe constructed or proposed to be constructed, and twenty-five per centum of which must be paid in cash. Such certificate shall have endorsed thereon or appended thereto and as a part thereof, an affidavit made by at least three of the directors named therein that at least ten hundred and [fol. 1003] fifty dollars of stock for every mile of line proposed to be constructed or maintained and operated has been in good faith subscribed, and twenty-five per centum paid in money thereon, and that it is intended in good faith to construct or to maintain and operate the line of pipe mentioned in such certificate, and that such corporation was not projected or formed with the intent or for the purpose of injuring any person or corporation, nor for the purpose of selling or conveying its franchise to any person or corporation, nor for any fraudulent purpose.

SEC. 42. *Condemnation of real property.*—In case such corporation is unable to agree for the purchase of any real estate required for the purposes of its incorporation, and its line of pipe in the county in which such real estate is situated has been finally located, it shall have the right to acquire title thereto by condemnation, but such cor-

poration shall not locate or construct any line of pipe through or under any building, dooryard, lawn, garden or orchard, except by the consent of the owner thereof in writing duly acknowledged, nor through any cemetery or burial ground, nor within one hundred feet of any building, except where such line is authorized by public officers to be laid across or upon any public highway, or where the same is laid across or upon any turnpike or plank-road. No pipes shall be laid for the purpose of carrying petroleum, gas or other products or property through or under any of the streets in the cities of this state, unless such corporation shall first obtain the consent of a majority of the property owners on the streets which may be selected for the laying of pipes, and such pipe line shall be located with all reasonable care and prudence so as to avoid danger from the bursting of the pipes.

SEC. 49. *Additional powers.*—Every corporation formed under this article shall in addition to the powers conferred by the general and stock corporation laws have power:

[fol. 1004] 1. To cause such examinations and surveys of its proposed line of pipe to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers, agents or servants may enter upon the lands or waters of any person, upon, through or across which such corporation can construct its line of pipe, under the provisions of this article, subject however to liability for all actual damage which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property, as shall be made to it to aid in the construction, maintenance, operation and accommodation of its pipe line.

3. To lay out its pipe line route not exceeding twelve feet in width, but at the terminations of such line and at all receiving and discharging points and at all places where machinery may properly or must necessarily be set up for the operation of such pipe line it may take such additional width, and for such length as may be necessary.

4. To take and convey through pipes any property, substance or product capable of transportation therein by any force, power or mechanical agency, and to erect and

maintain all necessary and convenient buildings, stations, fixtures and machinery for the purposes of its incorporation.

5. To regulate the time and manner in which property shall be transported over its pipe lines, and the compensation to be paid therefor, but such compensation shall not exceed the sum or be above the rate of twenty-five cents per one hundred miles for the transportation of forty-two gallons of any product transported on lines of one hundred miles in length or over, which shall be reckoned and adjusted upon the quantity or number of gallons delivered by such corporation at the point to which it shall have undertaken to deliver the same.

SEC. 50. *Use of line to be public; storage; liable as common carriers; rates and charges.*—The pipe lines of every such corporation shall be open for transportation to the public use, and all persons desiring to transport products [fol. 1005] through such pipe line shall have the absolute right upon equal terms to such transportation in the order of application therefor, on complying with the general requirements of such corporation, as to delivery for and payment of such transportation, but no application for such transportation shall be valid beyond or for a greater quantity of products than the applicant shall then own and have ready for delivery for transportation to such corporation, and every such corporation shall provide suitable and necessary receptacles for receiving all such products for transportation, and for storage at the place of delivery until the same can reasonably be moved by the consignee, and shall be liable as common carriers therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee, which time shall be fixed by general regulation by the corporation, and shall not be less than two days from and after the same shall be ready for delivery and notice thereof given to such consignee, and all rates and charges of every description, for or on account of or in any manner connected with the transportation of any products, shall be fixed by such corporation by general

rules and regulations, which shall be applicable to all parties who shall transport any products through such pipe line, or deliver or contract to deliver products for transportation and shall be written or printed and exposed to public view and at all times open to public examination.

SEC. 51. *Receipts for property; cancellation of vouchers; delivery of property.*—No receipt, certificate or order of any kind shall be made, accepted or issued by any pipe line corporation for any commodity unless the commodity represented by them is actually in possession of the corporation at the time of making, issuing or acceptance thereof. Whenever any such corporation shall have parted with the possession of any commodity and received therefor any order, voucher , receipt or certificate, such order, [fol. 1006] voucher, receipt or certificate shall not be issued or used again, but shall be cancelled with the word "cancelled" stamped or printed legibly across the face thereof, and such cancelled order, voucher, receipt or certificate shall be filed and preserved by such corporation and a record of the same kept by the secretary thereof. No petroleum or other commodity received for transportation by such corporation shall be delivered to any person without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same.

SEC. 52. *Monthly statements.*—Every pipe line corporation shall make monthly a specific statement showing the amount of all commodities received, the amount delivered during the month, and the stock on hand on the last day of each month of the year, and how much of such stock is represented by outstanding certificates, vouchers, receipts or orders, and how much in credit balances on the books of the corporation. Such statement shall be made on or before the tenth day of the succeeding month and verified by the oath of the president and secretary that it is in all respects true and correct, and shall be filed within three days thereafter in the county clerk's office in the county where the principal office of the corporation is located, and a true copy of the same posted in a conspicuous place in its principal office for at least thirty days thereafter.

[fol. 1007] Ohio

Page and Adams Annotated Ohio General Code, Vol. 4, pages 1002, 1003, title "Hydraulic" provides:

SEC. 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits or for storing transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid. (R. S. Sec. 3878.)

SEC. 10129. Such appropriation shall be made in accordance with the law providing for compensation to the owners [fol. 1008] of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of the purposes above specified, shall not include or extend to the erection of any tank, station,

reservoir, or buildings, or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto. (R. S. Sec. 3878.)

SEC. 10132. Such company or companies, for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state. (R. S. Sec. 3878.)

[fol. 1009] Oklahoma

Snyder's Constitution of Oklahoma, 1908, page 226, Article IX, title "Corporations—Definition," provides:

SECTION 1. *Have all powers not possessed by individuals.*—As used in this article, the term "corporation" or "company" shall include all associations and joint stock companies having any power or privileges, not possessed by individuals, and exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall mean the charter of incorporation, by or under which any corporation is formed. The term "license" shall mean the authority under which all foreign corporations are permitted to transact business in this State.

SEC. 2. *Common carriers—right to construct and operate lines.*—Every railroad, *oil pipe*, car, express, telephone or telegraph corporation or association organized or authorized to do a transportation or transmission business under the laws of this State for such purpose, shall, each respectively, have the right to construct and operate its line between any points in this State, and as such to connect at the State line with like lines; and every such company shall have the right with its road or line, to intersect, connect with, or cross any railroad or such line.

SEC. 4. *Oil pipe companies subject to control of commission.*—All oil pipe companies shall be subject to the reasonable control and regulation of the Corporation Commission, and shall receive and transport each other's tonnage or oils, or commodities, under such rules and regulation as shall be prescribed by law, or such commission.

SEC. 18. *Power of commission—may prescribe and enforce rates.*—The Commission shall have the power and

[fol. 1010] authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor and of correcting abuses and preventing unjust discrimination, and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void.

Sec. 31. *Corporation must incorporate in this State before it has right of eminent domain.*—No railroad, oil pipe line, telephone, telegraph, express or car corporation organized under the laws of any other State, or of the United States, and doing business, or proposing to do business in this State, shall be entitled to the benefit of the right of eminent domain in this State until it shall have become a body corporate pursuant to or in accordance with the laws of this State.

Chap. 11, Article I, section 786, and Chap. 53, Article II, sections 4309 and 4313, Revised Statutes of Oklahoma, provide:

Sec. 786. *Common carrier defined.*—Everyone who offers to the public to carry persons, property or messages is a common carrier of whatever he thus offers to carry. (1890.)

[fol. 1011] Sec. 4309. *Oil carriers are common carriers—Discrimination prohibited.*—Every corporation, joint stock company, partnership or person engaged in the business of carrying or transporting crude oil or petroleum or any of the products thereof for hire or otherwise, by pipe line, within this State, and by virtue of and in conformity to the provisions of this article, shall be deemed a common

arrangements as may be necessary to operate such pipes and pipe lines between different points in this State; to own, hold, use and occupy such lands, rights of way, easements, franchises, buildings, and structures as may be necessary to the purpose of such corporation.

Sec. 4. *Can condemn land; lay pipes, etc., along public roads, streets, etc.*—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the right to lay its pipes and [fol. 1019] pipe lines across and under any public road or under any railroad, railroad right of way, street railroad, canal or stream in this State, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this State, with the consent and under the direction of the board of aldermen or city council of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads; *provided*, that such pipe or pipe lines shall not pass through or under any cemetery, church, or college, schoolhouse, residence, business or storehouse, or through or under any building in this State, except by the consent of the owner or owners thereof; and *provided* further, that all such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owner or owners of such land; *provided* further, that if such pipe or pipe line shall be laid over or along any uncultivated or unimproved lands of another, and such lands shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as hereinbefore provided, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof; and *provided*, further, that whenever such pipe or pipe line shall cross any public road or highway, railroad, street railroad, or street or alley, the said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road, highway, street or alley by the public, or use and occupancy of such railroad, or street railroad by the owner or owners thereof; and *provided* further, that

such pipe line so laid shall not exceed eight inches in diameter.

Sec. 5. *Can borrow money, issue stocks, mortgage, etc.*—Such corporation shall have the right to borrow money to [fol. 1020] issue stock and preferred stock, to mortgage its franchises and property to secure the payment of any debt contracted for any of the purposes of such corporation, and shall possess all the rights and powers of corporations for profit in this State wherever the same may be applicable to corporations of this character.

Sec. 6. *Discrimination forbidden.*—It shall be unlawful for any corporation organized under this act to discriminate against any person, corporation, firm, association, or place in the charge for such storage or transportation, or in the service rendered; but shall receive, store or transfer oil or gas for any person, corporation, firm or association, upon equal terms, charges and conditions, with all other persons, corporations, firms, associations for like service.

[fol. 1021] West Virginia

West Virginia Code, 1906, chapter 62C (acts of 1879, C. 27; 1891, C. 44), title "Transportation of Petroleum or other Oils or Liquids" provides:

Sec. 2829. *Persons and companies subject to provisions of act.*—1. Every person, corporation or company now engaged or who shall hereafter engage or continue in the business of transporting or storing petroleum, by means of pipe line or lines or storage by tanks, shall be subject to the provisions of this act and shall conduct such business in conformity herewith; and the word company whenever used in this act shall be construed to include persons and corporations.

Sec. 2830. *Duty to receive for transportation—Connections with tanks or receptacles—Delivery.*—2. Any company heretofore or hereafter organized for the purpose of transporting petroleum or other oils or liquids by means of pipe line or lines, shall be required to accept all petroleum offered to it in merchantable order in quantities of not less than two thousand gallons at the wells where the same is produced, making at its own expense all necessary connections with the tanks or receptacles containing

such petroleum, and to transport and deliver the same at any delivery station, within or without the State, on the route of its line of pipes which may be designated by the owners of the petroleum so offered.

SEC. 2831. *Inspection—Grading and measurement before transportation—Receipts—Deductions for waste.*—3. All petroleum of a gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees Fahrenheit, offered for transportation by means of pipe line or lines, shall, before the same is transported, as provided by section two of this act, be inspected, graded and measured [fol. 1022] at the expense of the pipe line company, and the company accepting the same for transportation shall give to the owner thereof a receipt stating therein the number of barrels or gallons so received, and the grade, gravity and measurement thereof, and within a reasonable time thereafter, upon demand of said owner or his assigns, shall deliver to him at the point of delivery a like quantity and grade or gravity of petroleum in merchantable condition as specified in said receipt; except that the company may deduct for waste one per centum of the amount of petroleum specified in such receipt.

SEC. 2832. *Charge for transportation.*—4. The charge for receiving, transporting and delivering petroleum of the gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines, shall not exceed one cent per barrel of forty-two gallons per mile; Provided, That if said rate should amount for the whole distance transported to less than ten cents per barrel, then the sum of ten cents per barrel may be charged; and, provided that if the distance be over twenty miles and not more than thirty miles, one-half cent per barrel may be charged for every mile over twenty miles; and provided, further, that if the distance be over thirty miles, the maximum charge shall not exceed twenty-five cents.

SEC. 2833. *Charge for storage.*—5. Any company engaged in storing petroleum of a gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees Fahrenheit, by means of tanks, shall be permitted to charge for storage one cent per barrel per month or part of a month, unless the same is removed within fifteen days

from the date when said oil is received into the custody of such company, and shall be allowed for evaporation and waste one-half of one per centum of the oil per month unless removed within thirty days from the date of the receipt of such petroleum; but no company engaged in the business of storing petroleum of the gravity of thirty-five degrees Baumé or under, at a temperature of sixty degrees [fol. 1023] Fahrenheit, shall charge for storage any amount in excess of that authorized by this section.

SEC. 2834. *Inspection and measurement before transportation—Receipts—Contents—Deductions for waste—Delivery—Liability for loss.*—6. All petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, offered for transportation by means of pipe line or lines, shall be inspected and measured at the expense of the company transporting the same, before the same is transported; and the company accepting the same for transportation, shall give to the owner thereof, or to the person in charge of the well or wells from which such petroleum has been produced and run, a ticket signed by its gauger, stating the number of feet and inches of petroleum which were in the tank or receptacle containing the same before the company began to run the contents from said tank, and the number of feet and inches of petroleum which remained in the tank after said run was completed; and all deductions made for water, sediment or the like, shall be made at the time such petroleum is measured; and within reasonable time thereafter said company shall, upon demand, deliver from the petroleum in its custody to the owner thereof, or to his assignee, at such delivery station on the route of its line of pipes as he may elect, a quantity of merchantable petroleum, equal to the quantity of petroleum run from said tank, or receptacle, which shall be ascertained by computation; except that the said company transporting said petroleum may deduct for evaporation and waste two per centum of the amount of petroleum so run, as shown by said run ticket; and except that in case of loss of any petroleum while in the custody of said company caused by fire, lightning, storm or other like unavoidable cause, such loss shall be borne pro rata by all the owners of such petroleum at the time thereof. But said company shall

be liable for all petroleum that is lost while in its custody by the bursting of pipes or tanks, or by leakage from pipes [fol. 1024] or tanks; and it shall also be liable for all petroleum lost from tanks at the wells where produced before the same has been received for transportation, if such loss be due to faulty connections made to said tanks; and said company shall be liable for all petroleum lost by the overflow of any tanks with which pipe line connections have been made, if such overflow be due to the negligence of such company; and for all the petroleum lost by the overflow of any tanks with which pipe line connections should have been made under the provisions of this act, but were not so made by reason of negligence or delay on the part of said company.

SEC. 2835. *Charge for transportation and delivery.*—7. Any company engaged in transporting petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines, may charge for receiving, transporting and delivering such petroleum not to exceed twenty cents per barrel for each barrel of forty-two gallons; Provided, however, if where the point of delivery is without this State, more than twenty cents per barrel be charged, then there shall be charged no greater sum than ten cents per barrel for receiving such oil and transporting the same that part of the distance which is within this State.

SEC. 2836. *Same—Time for commencement of charge—Deductions for waste and evaporation.*—8. Any company engaged in transporting or storing petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, by means of pipe line or lines and tanks, shall make no charge for storing said petroleum until after the expiration of the month following that in which the oil was run and received into custody. But it may charge for storing said petroleum of a gravity exceeding thirty-five degrees Baumé at a temperature of sixty degrees Fahrenheit, for every day after the expiration of the month following that in which said oil shall have been run and received into custody, not to exceed one-fortieth of one cent per barrel of forty-two gallons for each day thereafter said oil shall continue to [fol. 1025] remain in its custody. And such company shall

make no charge for water, sediment, waste and the like in transporting or storing any petroleum after the same has been gauged or measured, before the run of the same is made, except the two per centum for waste and evaporation, hereinbefore mentioned.

SEC. 2837. *Discrimination prohibited.*—9. No company engaged in transporting or storing petroleum by means of pipe line or lines and tanks shall charge, demand or receive from any corporation, company, association, person or persons a greater or less rate for the transportation or storage of petroleum than it charges, receives or demands from any other corporation, company, association, person or persons for the transportation or storage of petroleum of like gravity; and any shift, device or subterfuge made or attempted for the purpose of avoiding the provisions of this section shall be void.

SEC. 2838. *Penalties—Damages for excessive charges.*—10. Any company, its officers or agents, wilfully violating any of the provisions of sections two, three, four, five, six, seven, eight or nine, of this act, or charging for any of the services provided for in any of said sections, an amount in excess of that authorized by said sections, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars, nor more than one thousand dollars, and shall moreover be liable to the party aggrieved for all damages sustained by him by reason of such excessive charges.

SEC. 2839. *Lien for charges.*—11. Any company engaged in transporting or storing petroleum, shall have a lien upon said petroleum until all charges for transporting and storing said petroleum are paid.

SEC. 2840. *Negotiability of accepted orders and certificates.*—12. Accepted orders and certificates for petroleum, issued by any company engaged in the business of transporting and storing petroleum in this State, by means of pipe line or lines and tanks, shall be negotiable, and may [fol. 1026] be transferred by endorsement, either in blank or to the order of another, and any person to whom the said accepted orders and certificates shall be so transferred, shall be deemed and taken to be the owner of the petroleum therein specified.

SEC. 2841. *Receipts, certificates, etc.—Unauthorized issuance—Duplicates—Surrender—Loss—Cancellation.*— 13. No receipt, certificate, accepted order or other voucher, shall be issued or put in circulation nor shall any order be accepted or liability incurred for the delivery of any petroleum, crude or refined, unless the amount of such petroleum represented in or by such receipt, certificate, accepted order, or other voucher or liability, shall have been actually received by and shall then be in the tanks and lines, custody and control of, the company issuing or putting in circulation such receipt, certificate, accepted order or voucher, or written evidence of liability. No duplicate receipt, certificate, accepted order or other voucher shall be issued or put in circulation, or any liability incurred for any petroleum, crude or refined, while any former liability remains in force, or any former receipt, certificate, accepted order or other voucher shall be outstanding and uncancelled, except such original paper shall have been lost, in which case a duplicate plainly marked "duplicate" upon the face, and dated and numbered as the lost original was dated and numbered, may be issued. No receipt, voucher, accepted order, certificate or written evidence of liability of such company on which petroleum, crude or refined, has been delivered, shall be re-issued, used or put in circulation. No petroleum, crude or refined, for which a receipt, voucher, accepted order, certificate or liability incurred, shall have been issued or put in circulation, shall be delivered, except upon the surrender of the receipt, voucher, order or liability representing such petroleum, except upon affidavit of loss of such instrument made by the former holder thereof. No duplicate receipt, certificate, voucher, accepted order or other evidence of liability, shall be made, [fol. 1027] issued or put in circulation until after notice of the loss of the original, and of the intention to apply for a duplicate thereof, shall have been given by advertisement over the signature of the owner thereof in at least four successive issues of a daily or weekly newspaper published in the county where such duplicate is to be issued. Every receipt, voucher, accepted order, certificate or evidence of liability, when surrendered, or the petroleum represented thereby delivered, shall be immediately cancelled by stamping and punching the same across the face in large and legible letters with the word "cancelled,"

and giving the date of such cancellation; and it shall then be filed and preserved in the principal office of such company for the period of six years.

Sec. 2842. *Sale, incumbrance, etc., without consent of owner.*—14. No company, its officers or agents, or any person or persons engaged in the transportation or storage of petroleum, crude or refined, shall sell or encumber, ship, transfer, or in any manner remove or procure, or permit to be sold, encumbered, shipped, transferred, or in any manner removed from the tanks or pipes of said company engaged in the business aforesaid, any petroleum, crude or refined, without the written order of the owner or owners thereof.

Sec. 2843. *Monthly statements.*—15. Every company now or hereafter engaged in the business of transporting by pipe lines, or storing crude or refined petroleum in this State, shall, on or before the tenth day of each month, make or cause to be made and posted in its principal business office in this State in an accessible and convenient place for the examination thereof by any person desiring such examination, and shall keep so posted continuously until the next succeeding statement is so posted, a statement plainly written or printed, signed by the officer, agent, person or persons having charge of the pipes and tanks of said company, and also by the officer or officers, person or persons, having charge of the books and accounts thereof, which {fol. 1028} statement shall show in legible and intelligent form the following details of the business:

First. How much petroleum, crude or refined, was in the actual and immediate custody of such company at the beginning and close of the previous month, and where the same was located or held; describing in detail the location and designation of each tank or place of deposit, and the name of its owner.

Second. How much petroleum, crude or refined, was received by such company during the previous month.

Third. How much petroleum, crude or refined, was delivered by such company during the previous month.

Fourth. For how much petroleum, crude or refined, such company was liable for the delivery or custody of to other

corporations, companies or persons at the close of the month.

Fifth. How much of such liability was represented by outstanding receipts or certificates, accepted orders or other vouchers, and how much was represented by credit balances.

Sixth. That all the provisions of this act have been faithfully observed and obeyed during the said previous month.

The statement so required to be made shall also be sworn to by said officers, agent, person or persons before some officer authorized by law to administer oaths, which oath shall be in writing, and shall assert the familiarity and acquaintance of the deponent with the business and condition of such company, and with the facts sworn to, and that the statements made in the said report are true.

Sec. 2844. *Same—Specification of amounts—Duty to keep on hand oil equal to aggregate outstanding receipts, etc.*—16. All amounts in the statements required by this act, when the petroleum is handled in bulk, should be given in barrels and hundredths of barrels reckoning forty-two gallons to each barrel, and when such petroleum is handled in barrels [fol. 1029] or packages, the number of such barrels or packages shall be given, and such statements shall distinguish between crude and refined petroleum, and give the amount of each. Every company engaged in the business aforesaid, shall at all times have in their pipes and tanks an amount of merchantable oil equal to the aggregate of outstanding receipts, certificates, accepted orders, vouchers, acknowledgements, evidences of liability, and credit balances, on the books thereof.

Sec. 2845. *Penalties for unauthorized issuance of receipts, etc.*—17. Any company, its officers or agents, who shall make or cause to be made, sign or cause to be signed, issue or cause to be issued, put in circulation or cause to be put in circulation, any receipt, accepted order, certificate, voucher or evidence of liability, or shall sell, transfer or alter the same, or cause such sale, transfer or alteration, contrary to the provisions of this act, or shall do or cause to be done, any of the acts prohibited by the thirteenth section of this act, or omit to do any of the acts by said section directed, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of not exceeding one thousand dollars, and undergo imprisonment not less than ten days nor exceeding one year.

Sec. 2846. *Penalties for unauthorized sales, incumbrances, etc.*—18. Any company, its officers, or agents, who shall sell, encumber, transfer or remove, or cause or procure to be sold, transferred or removed from the tanks or pipes of such company, any petroleum, crude or refined, without the written consent of the owner or owners thereof, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of one thousand dollars and undergo an imprisonment of not less than ninety days and not exceeding one year.

Sec. 2847. *Penalties for failure to make reports.*—19. Any company engaged in the business of transporting by pipe lines or storing petroleum, crude or refined, and each [fol. 1030] and every officer or agent of such company who shall neglect or refuse to make the report and statement required by the fifteenth section of this act, within the time and the manner directed by said section, shall forfeit and pay the sum of one thousand dollars, and in addition thereto the sum of five hundred dollars for each day after the tenth day of the month that the report and statement required by said section fifteen shall remain unposted as therein directed.

Sec. 2848. *Examination of companies.*—20. The holder of any receipts, certificates, accepted orders, or other vouchers or evidences of liability, or the owners of oil in the custody of any such company described and referred to in this act, to an amount not less in the aggregate than ten thousand barrels of petroleum, crude or refined, may at any time present their petition to the circuit court of any county, wherein such company may be engaged in business or have its principal office, or to any judge of said court in vacation, setting forth under oath, their ownership as aforesaid and desire for the appointment of examiners for the purposes of this section; and upon such petitioners giving bonds to be approved by the court or by the judge granting the order that they will pay all expenses and costs that may accrue in the proceedings, the court, or any judge thereof in vacation, shall forthwith appoint such number of impartial, disinterested and expert persons as may be asked for in said petition, as examiners, and shall fix the amount of their compensation; and the court or judge by order, shall direct and empower such examiners to immediately inspect and measure all the petroleum, crude or refined, in the custody of any such company named in the

said petition, on the day of such inspection, and to examine the books of said company relating to the issue and cancellation of receipts, certificates, accepted orders, vouchers, or evidences of liability, and to its open accounts with persons, companies or corporations with whom it deals in the receipt and delivery of crude or refined petroleum. Such examiners when so appointed shall each immediately be [fol. 1031] sworn before any authorized officer to perform his duties with fidelity and according to law, which oath shall be reduced to writing, signed and filed with the clerk, and they shall then make immediate inspection, examination and measurement, as required by said petition and order and by this act. And it shall be the duty of each and every such company, its officers, agents and employees, to give immediately upon request of any such authorized examiners, all the information demanded in said petition and required by this act to be reported, and also full access to the offices, tanks, pipes, books and accounts of such company. Upon the completion of such inspection, measurement and examination, it shall be the duty of the examiner or examiners, or in the event of the death, resignation, declination or inability to act of any of them, then the others, or any of them within ten days after their appointment to make to the court appointing them, a written, signed and sworn report of such examination, inspection and measurement, and file the same of record with the clerk thereof, which report shall show:

First, How much merchantable and also how much unmerchantable petroleum, crude or refined, they found in the tanks and lines of such company, and where the same was located or held by description of tanks.

Second. For the custody or delivery of how much crude or refined petroleum they found such company to be liable at the same date.

Third. How much of such liability was represented by outstanding receipts, accepted orders, certificates, vouchers, or evidence of liability, and how much by credit balances.

Sec. 2849. *Offenses by examiners.*—21. Any examiner so appointed as aforesaid who shall make any false examination, inspection, measurement or report, or shall make known directly or indirectly to any person any information he may become possessed of in the course of his examina-

tion, inspection or measurement, except by means of his [fol. 1032] report made and filed in accordance with this act, or who shall receive directly or indirectly any fee, reward or benefit, or the promise of any fee, reward or benefit, other than that provided by this act, for the performance or non-performance of any duty or thing contemplated by this act, or connected with his said employment, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of one thousand dollars, and may at the discretion of the court, be confined in jail not to exceed one year.

Sec. 2850. *Same—Refusal to furnish information, etc.—Penalties.*—22. Any officer, agent, manager, superintendent or employe of any company engaged in the transportation by pipe lines of petroleum, crude or refined, or the storage thereof, who shall refuse or neglect after demand made to give to any authorized examiner full and free access to any and all offices, pipes, tanks, accounts, books and vouchers required by him in the pursuance of his appointment and this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be sentenced to pay a fine of not exceeding one thousand dollars, and may at the discretion of the court be confined in jail not to exceed one year.

Sec. 2851. *Repeal.*—23. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Eminent Domain

Sec. 2229. *Corporations for transportation of natural gas, water, etc.—Powers—Duties and liabilities as common carriers.*—24. That a company organized for the purpose of transporting natural gas, petroleum or water, necessary for use in carrying out the provisions of this act in piping and transporting natural gas and petroleum or for boring for the same, through tubing and pipes, may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, and may appropriate so much thereof as may be deemed necessary for the laying down of such tubing and [fol. 1033] piping, and for the erection of tanks and the location of stations along such line, and the erection of such buildings as may be necessary for the purpose aforesaid; such appropriations shall be made and conducted in accordance with the law providing for compensation to the owners

of private property taken for public use; Provided, That no dwelling house, yard or garden, shall be taken for such purpose, nor shall any oil tank, gas or oil pipe line be erected or laid within one hundred feet of any occupied dwelling house without the consent of the owner thereof. And so far as the rights of the public therein are concerned, the county commissioners as to public roads, and the council of any municipal corporation, as to streets and alleys, in their respective jurisdiction, may, subject to such regulations and restrictions as they may prescribe, grant to such company the right to lay such tubing and piping therein: Provided, however, The right to appropriate for any of the purposes herein above specified shall not include or extend to the erection of any tank, station or building, or lands thereof, or to more than one continuous line of pipe or tubing, or land therefor, in or through a municipal corporation without the council first consents thereto; and all excavations shall be well filled by such company and so kept by it, in all cases. Such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State.

[fol. 1034] Wyoming

The Constitution of Wyoming, Section 7, Article X, title "Corporations," provides:

Sec. 7. *Common carriers, who are.*—All corporations engaged in the transportation of persons, property, mineral oils, and mineral products, news or intelligence, including railroads, telegraphs, express companies, pipe lines and telephones, are declared to be common carriers.

Mullen's Wyoming Compiled Statutes, 1910, chapter 27? (act of 1891), title "Railroad Corporations," provides, by Sections 4200 and 4201 for the power of eminent domain, which sections are made applicable to oil companies:

Sec. 4202. *Applicable to oil companies.*—The last two preceding sections shall also apply to all petroleum oil corporations, companies and individuals, for the right of way ten feet wide, through the school and other lands, over which the state has control, for the purpose of carrying oil through pipes, also land for pump stations, tanks and other buildings, necessary to conduct the oil product of the wells of Wyoming.

[fol. 1035] EXHIBIT "D"

To the Petition for Rehearing

Nos. 481, 482, 483, 506, 507, 508

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1913

No. 481. THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Cornplanter Refining Company, Appellants,

v.

THE OHIO OIL COMPANY

No. 482. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

STANDARD OIL COMPANY

No. 483. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

STANDARD OIL COMPANY OF LOUISIANA

No. 506. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

PRAIRIE OIL & GAS COMPANY

No. 507. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

THE UNCLE SAM OIL COMPANY

No. 508. THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and WELLSVILLE REFINING COMPANY, Appellants,

v.

ROBERT D. BENSON ET AL., PARTNERS DOING BUSINESS UNDER THE PARTNERSHIP NAME OF THE TIDEWATER PIPE COMPANY, LTD.

Appeals from the United States Commerce Court

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION

Charles W. Needham, Assistant Solicitor.

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[fol. 1042] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1913

Nos. 481, 482, 483, 506, 507, 508

No. 481

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Cornplanter Refining Company, Appellants,

v.

THE OHIO OIL COMPANY

No. 482

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

STANDARD OIL COMPANY

No. 483

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

STANDARD OIL COMPANY OF LOUISIANA

No. 506

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

PRAIRIE OIL & GAS COMPANY

No. 507

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

THE UNCLE SAM OIL COMPANY

No. 508

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Wellsville Refining Company, Appellants,

v.

ROBERT D. BENSON et al., Partners Doing Business under the Partnership Name of The Tidewater Pipe Company, Ltd.

Appeals from the United States Commerce Court

[fol. 1043] Brief on Behalf of the Interstate Commerce Commission

Questions Involved

These cases involve the construction and constitutionality of an act of Congress, approved June 29, 1906, amending section 1 of the act to regulate commerce, bringing the interstate transportation of oil by pipe lines under the act, and declaring that the agents of such commerce "shall be considered and held to be common carriers within the meaning and purpose of this act."

Legislative Reasons

The moving cause of this legislation was to prevent the monopoly of petroleum by the practice—(1) of pipe lines buying crude oil at the wells, for the Standard Oil Company's refineries, at arbitrary prices fixed by the Standard Oil Company; (2) of pipe lines refusing to transport any oil unless the title to the oil was vested in the pipe line, the producer agreeing to accept therefor the price so fixed; and (3) of the pipe lines refusing to deliver crude oil to independent refineries.

Appeals

These appeals were taken from the interlocutory decrees of the Commerce Court granting preliminary injunctions restraining the enforcement of an order entered by the Interstate Commerce Commission on the 3d day of June, A. D. 1912. The order was entered in a proceeding then pending before the Commission entitled "In the matter of Pipe [fol. 1044] Lines" (No. 4199). In that proceeding the appellees, with others, were made respondents (Rec., No. 481, pp. 7 and 8), and they appeared and were given a full hearing. A report was made by the Commission giving its conclusions as required by law. (Rec., 481, p. 45; 24 I. C. C. Rep., 1.)

The Commission's Order

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3d day of June, A. D. 1912.

No. 4199

In the Matter of Pipe Lines

This proceeding having been instituted by the Commission on its own motion, and investigation having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That respondents, The Oklahoma Pipe Line Company, The Prairie Oil & Gas Company, Standard Oil Company of Louisiana, The Ohio Oil Company, Standard Oil Company of New Jersey, The Tidewater Pipe Company, Limited, Producers & Refiners Oil Company, Limited, United States Pipe Line Company, Pure Oil Company, Pure Oil Pipe Line Company, The National Pipe Line Company, The Uncle Sam Oil Company, and The Uncle Sam Oil Company of Kansas be, and they are hereby, notified and required to file with this Commission, on or before the 1st day of September, [fol. 1045] 1912, schedules of their rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce. (Record No. 481, pp. 8, 9, and 56.)

It will be observed that this order is nothing more nor less than the requirement, relating to rates, in section 6 of the act to regulate commerce. If these pipe lines are subject to the act it was and is their duty to file schedules of their rates as required by the statute.

Commission's Report

The Commission entered the order against the appellants herein upon findings of fact and conclusions set forth in its said report (Rec., No. 481, p. 45; 24 I. C. C., 1). The report is referred to and made a part of the order. This report found that each appellee was engaged in the transportation of oil by pipe lines from one State to another State in the United States and was a carrier subject to the act.

Contention by Appellees

The contention of the appellees before the Commission and before the Commerce Court was that they are not com-

mon carriers subject to the act because they have not transported and do not hold themselves out to transport, oil for the public, but only transport "their own oil," purchased in the manner hereinafter set forth.

The Commission found, and the answers of the Commission in the Commerce Court alleged, that the appellees are [fol. 1046] engaged in the interstate transportation of oil by pipe lines; that such transportation is commerce over which Congress has plenary power; that Congress may determine by what agents such commerce shall be carried; and that, by the said amendment of June 29, 1906, Congress declared that the agents thereafter engaged in carrying on such transportation or commerce "shall be considered and held to be common carriers" under the act. These carriers were, therefore, ordered to file with the Commission schedules of their rates and charges for the transportation of oil in compliance with the provisions of section 6 of the act to regulate commerce.

Amendment to Section 1

The essential portion of the amendment to section 1 of the act to regulate commerce, approved June 29th, 1906, involved in this controversy, reads as follows:

> That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil * * * by means of pipe lines * * * from one State, to any other State, who shall be considered and held to be common carriers within the meaning and purpose of this act.

Decision by the Commerce Court

The Commerce Court held (1) that the appellees were private pipe-line companies; (2) that Congress had no power to compel them to be common carriers, nor could it, [fol. 1047] under its regulating power, deprive them of the right to carry oil, in interstate commerce, as private carriers; (3) that the amendment of 1906 in terms applies to the appellees, "in common with other pipe-line companies of like character and business"; (4) that said act of Congress was therefore "an exertion of power in excess of constitutional limitations"; and (5) that said legislation "invades the rights secured to these petitioners by the fifth amendment."

In reference to the monopoly created by this method of carriage the Commerce Court said:

> It will be observed that the amendment makes no mention of monopoly and therefore does not purport on its face to be a measure for breaking up an alleged monopoly and preventing its continuance. But disregarding the absence of any declared purpose, and taking into account the circumstances under which the amendment was adopted, we may properly consider its validity upon the assumption that the real though undisclosed purpose was to destroy that degree of control of the oil business which is claimed to result from the private ownership of pipe lines and which is asserted to be monopolistic. (Record, 481, p. 121, Op. p. 33.)
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> • • • • • • •
>
> True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. The practical result may be, and in most in- [fol. 1048] stances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line, and in this sense it may be said that they are obliged to sell to him. Granted that his pipe line give him such command that he is able to control or even fix the selling price of the crude article in that particular field or territory, upon what sustainable theory can it be claimed that other producers are deprived of anything which rightfully belongs to them because they do not or can not provide themselves with the same means of reaching the market? (Rec., p. 125; Op., p. 37.)
>
> • • • • • • •
>
> In the nature of things one who owns private property of substantial value has an advantage over those not fortunate enough to have similar possessions, and this advantage ranges through all degrees. It frequently results in commercial dominance of precisely the same sort and quite as complete as the alleged monopoly here considered. But the advantage so acquired, whatever its degree, is not monopolistic, nor are we able to see that it has any tendency, much less an

inevitable tendency, to bring about the conditions which constitute an unlawful monopoly, except upon the socialistic theory that all private ownership is indefensible and that everything should be held in common. (Rec., p. 126; Op., p. 38.)

* * * * * * *

It may be that the greater number of oil producers are virtually compelled to sell their output to the own- [fol. 1049] ers of private pipe lines, because they are unable or unwilling to build pipe lines of their own, or because there are no common-carrier pipe lines to which they have access, but we are quite unable to see how the situation in which such producers are placed gives them the right, or what constitutional power Congress can exert to endow them with the right, to use the private lines of petitioners and other private companies, or how the denial of such use is a monopolistic exclusion or indicates a tendency to monopoly which deprives these private owners of the protection guaranteed by the fifth amendment. In our judgment there is no basis for the contention that the pipe-line amendment has any real or substantial relation to the monopoly alleged to result from the nature and methods of pipe-line transportation. (Rec., p. 127; Op., p. 39.)

Decree in Effect Final

The decree of the Commerce Court granted a preliminary injunction, but the decision in effect determines the controversy by declaring the act of Congress unconstitutional and void as against these appellees. The cases below were argued upon the understanding that the decision, if in favor of the appellees, would in effect be a final decree, while if in favor of the contentions by the Commission it would leave no other question to be determined in the cases, and the petitions would have to be dismissed. Expressing this view, the Commerce Court concludes its opinion by saying:

[fol. 1050] Without reference to other considerations which might justify preliminary injunctions in these cases, we have purposely placed our decision upon grounds which in effect determine the controversy, and we have done so to avoid occasion for pro-

tracted trials and to aid an early review by the court of last resort. (Rec., p. 137; Op., p. 49.)

In thus disposing of the cases, the Commerce Court acted in accordance with the suggestion of this court as to a proper disposition of a case upon a preliminary motion which involves a determination on the merits. This court, in remanding a case upon an appeal from an interlocutory order so that there might be opportunity to dispose of it on the merits, speaking through the Chief Justice, said:

> Of course, in saying this, we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly in our judgment appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so. (*U. S.* v. *Balt. & Ohio R. R. Co.*, 225 U. S., 306, 326.)

These cases, therefore, are presented for final determination, upon the records herein. The errors assigned raise the following

[fol. 1051] Questions of Law

I

Is the business of the appellees affected with a public interest to an extent that it ceases to be *juris privati* only?

II

Does the act to regulate commerce, as amended by the act of June 29, 1906, require that all persons and corporations thereafter transporting oil by pipe lines shall be common carriers under and subject to the act?

III

If the act as amended does require that all corporations and persons thereafter engaged in the interstate trans-

portation of oil by means of pipe lines shall be common carriers, is the act constitutional?

General Statement of Facts

Before discussing these questions of law, it is important to state the essential facts as they appear in the record. These facts are found in the allegations of the petitions, the report of the Interstate Competitions, the sworn answers of the Interstate Commerce Commission (used as affidavits on the hearing for preliminary injunction), the answers of the United States, and affidavits presented by petitioners upon the motion for preliminary injunction. There are also official records and public documents, of which this court takes judicial notice, to which reference is made, principaliy the record and decisions of the court [fol. 1052] in the Standard Oil case (221 U. S., p. 1), and the debates in Congress upon the amendment of June 29, 1906, now requiring construction by this court.

Public interest.—The business of transporting petroleum is "clothed with a public interest." The production of crude oil, its grading and measurement, its transportation and distribution, are matters in which the public is deeply concerned. The extent of the public interest is shown by the amount of oil produced; the uses to which the oil and its products are put; the necessity of transporting the crude oil from the fields of production to refineries in distant parts of the country; the effect of the cost of transportation upon production and consumption; and the effect, upon all these interests, of a practice resulting in a monopoly of the crude oil.

Statistics.—The statistics here given are (1) those for the year 1905—which were before Congress when it passed the act in controversy—and (2) those for the year 1911, the last available figures. They are taken from public documents and records as follows: Report of the Commissioner of Corporations on the Transportation of Petroleum, May 2, 1906; Report of the Commissioner of Corporations on the Petroleum Industry, March 20, 1907: Statistical Abstract of the United States for 1907 and 1912, and statistics and other facts stated in the petitions and in the answers of the Interstate Commerce Commission and exhibits, in the pending cases.

[fol. 1053] *Importance of the petroleum industry.*—The production of crude petroleum throughout the world in

1905 was 215,000,000 barrels (42 gallons each), of which 134,717,580 barrels, or more than 60 per cent, was produced in the United States. The greater portion of that produced in the United States came from the fields east of the Rocky Mountains. The value of this product for the year 1905, fixed by the prices of the Standard Oil Company, was nearly $120,000,000.

The first statistical information regarding this product was for the year 1860, when the quantity produced in the United States was only 84,000 *gallons*. In 1905 the production had increased to 5,658,138,360 *gallons*.

In 1911 the production in the United States had increased in quantity to 220,449,391 *barrels*. The value of this product for 1911, at prices arbitrarily fixed by the Standard Oil Company, was $134,044,752. While the quantity had increased by nearly 86 million barrels the value had increased only 15 million dollars. With free competition this product should have brought the producers from 150 to 200 millions of dollars without materially increasing the cost to the consumer of the refined product.

Uses.—The refined oil is used for illumination over the civilized world. For power and heating purposes petroleum and its products are widely used, and their use is increasing. For lubricating oils and in the manufacture of a multitude of by-products it forms the bases of large industrial operations. In fact its use is so general, [fol. 1054] and so diversified, and so essential to modern civilized life, that it must be put in the category of *necessities*.

Fields of production.—Crude oil is produced in various sections of the country described as "fields." The most important of these are the Appalachian field, covering parts of the States of New York, Pennsylvania, West Virginia, southeastern Ohio, Kentucky, and Tennessee; the Lima-Indiana and Illinois field, covering parts of northwestern Ohio, Indiana, and Illinois; the Mid-Continent field, covering parts of the States of Kansas and Oklahoma; the Gulf field, covering parts of the States of Louisiana and Texas; the Caddo field in Louisiana and Texas, and others in the States of California, Wyoming, Michigan, and Missouri. The important fields, east of the Rocky Mountains, together with the pipe lines and refineries, are shown upon the map attached to the answers of the Interstate Commerce Commission. (Rec. No. 481, p. 60.) In

each of these fields there are thousands of wells from which crude oil is obtained, owned and operated by private citizens. The oil east of the Rocky Mountains is not suitable for domestic use, and therefore it must be refined.

Refineries.—The Standard Oil Company has refineries at numerous strategic points. Of its eighteen refining plants, seven, including the two largest, are on the Atlantic seaboard—five on New York Harbor (including Bayonne, N. J.), one at Philadelphia, another at Baltimore. The location of refiners on the seaboard is of great advantage [fol. 1055] in view of the immense foreign trade and the heavy consumption of refined oil on the seaboard. Five smaller plants are in the vicinity of the Appalachian field, two in Ohio, near the Lima, Ind., field, and another large plant is at Whiting, Ind. From these refineries the Standard can conveniently reach the great markets of the Middle West and South. It has a refinery at Sugar Creek, Mo., and another at Neodesha, in southern Kansas.

Since the hearing of the testimony in the original Standard Oil case *supra*, the Standard located a large refinery at Baton Rouge, La., served by the pipe line operated by the Standard Oil Company of Louisiana (No. 483). This company was organized in April, 1909. There were in 1906 independent refineries, but the proportion of oil refined by the Standard Oil refineries was 84.2 per cent of the crude oil marketed; the balance, 14.8 per cent, was refined by the independent refineries.

Transportation of crude oil.—It will be observed from the location of the fields of production and the location of refineries that the transportation of crude oil is of very great importance to producers and consumers. The refineries are located in the eastern part of the country for convenience to the markets. The transportation of the crude oil varies in distance up to approximately 1,500 miles. The cost of transporting by pipe lines is estimated at one-fourth (possibly one-fifth) the cost of transportation by rail. This method of transportation has had an [fol. 1056] important influence in determining the location and the building of refineries.

Pipe lines.—The use of pipe lines has been the most potent factor in enabling the Standard Oil Company to secure and maintain a dominant control of the petroleum industry. No producer, or refiner, or dealer in oil, can enter or compete in this industry without access to pipe

lines. To be obliged to transport the crude oil any great distance by railroad is absolutely prohibitive.

Transportation by pipe lines began in 1865, but the main development has been since 1879.

Practically all of the crude oil produced in the United States is now transported to the refineries by means of pipe lines. A network of small pipes gathers the oil from the wells into tanks, and trunk lines, hundreds of miles in length, singly or in connection with other lines, convey it to the refineries.

The refined products of petroleum are transported mainly by rail and water in barrels or tanks. This is so because the refined article goes to a multitude of points for consumption and is delivered in comparatively small quantities. There has been a large increase in the transportation of refined oil by pipe lines from interior refineries to the seaboard for export; these lines do not deny that they are common carriers, and they are not involved in this controversy. We have here to consider only the transportation of crude oil from the fields of production to refineries. [fol. 1057] This transportation is not an interplant service; it is a transportation business. It is specified as a separate and distinct object of incorporation in the several charters. It is a business primarily and essentially within the term "commerce" as used in the Federal Constitution. It is a business that Congress has the power to segregate from the business of buying and selling and refining. (*New Haven Railroad* v. *Int. Com. Com.*, 200 U. S., 361; *United States* v. *Delaware & Hudson Co.*, 213 U. S., 366, 415.)

Importance of transportation charges to the public.—In the Report of the Commissioner of Corporations on the Transportation of Petroleum, May 2, 1906, the importance of this subject is stated as follows:

> The petroleum industry affords a striking example of the importance of the transportation problem. The cost of transportation is an exceedingly large factor in the cost of oil to the consumer. Consequently, any difference in transportation costs, as between different producers and refiners of oil, has a powerful influence upon their respective positions in competition.
>
> The importance of transportation, with respect to petroleum, grows chiefly out of the fact that petroleum and most of its products are low-priced commodities.

> They are heavy in proportion to their value. Moreover, the value of the raw material, crude petroleum, is a large proportion of the total cost of the finished product, while the cost of refining is comparatively [fol. 1058] small, and a reasonable profit to the refiner is also a comparatively small factor per unit of product. Even an apparently slight difference in transportation rates may, therefore, enable one refiner to sell at a profit while his competitor is losing money (p. 33).
>
> And these differences in freight rates, whether legitimate or illegitimate, may easily make the difference between profit and loss to the refiner of petroleum (p. 34).

As already noted; the cost of the transportation of oil by pipe lines is at most one-fourth the cost of transportation by rail. The producer, the dealer, or the refiner must, therefore, be able to transport oil by pipe lines or leave the field to those who possess this facility. This means monopoly for the refineries controlling pipe lines; monopoly for the Standard Oil Company as conditions existed at the time of the legislation in controversy. The Commerce Court was compelled to say:

> True, the possession of a pipe line enables its owner to transport his oil to the refinery or other market at very small cost compared with any other means of conveyance. The practical result may be, and in most instances doubtless would be, that other producers find it to their interest to sell the output of their wells to the owner of the pipe line, and in this sense it may be said that they are obliged to sell to him.

Method of controlling the price and distribution of crude oil by pipe lines.—At the time of the legislation under con- [fol. 1059] sideration the appellees, excepting the Uncle Sam Oil Company (No. 507), and the Standard Oil Company of Louisiana (No. 483), organized by the Standard in 1909, were owned and absolutely controlled by the Standard Oil Company. The Standard also owned and controlled many other lines. (See list Rec. 482, pp. 73, 74.) The method of doing the business was devised by that company; it was in effect on all lines, and the purpose was to control the oil industry of the United States (*Standard Oil Co. case, supra*). Aside from the "combination,"

which was held by this court to be unlawful under the Anti-Trust Act, the means, and we may say the principal means, by which this monopoly was secured, was through the ownership of the pipe lines *and the practice of buying the oil for the refineries, through the pipe lines, at the wells.* This *practice* is set forth in the sworn answers of the Interstate Commerce Commission, and in the agreement which each producer must sign before a connection will be made between his tank at the well and the receiving tanks of the pipe line. (Rec. No. 506, pp. 15, 16, 17.) By this contract the producer agrees that the oil *shall become the property of the pipe line* "as soon as the same is received into its custody," and, that "The oil received * * * shall be paid for * * * at *the market price paid by the*" pipe line. The prices *allowed to the producers,* referred to in said agreements, *are arbitrarily fixed and posted by the pipe line.* Upon these terms and conditions the pipe line *will take all the oil offered.* No common [fol. 1060] carrier holds itself out, in a greater degree or to a greater extent, to take traffic for transportation, than these pipe lines do—upon the conditions named. Any producer desiring to market his oil to refineries (the only buyers) can do so by signing this monopoly contract. If he refuses to sign this contract he can not reach a refinery, because every other means of transportation is of no avail on account of the excessive cost. The cost by rail to an eastern refinery is usually the same as the monopoly price for the oil at the well. The producers must accept this arbitrary agreement and price for their product or allow the oil to run to waste upon the ground. "Take our price or take nothing" is the imperial edict of the monopoly and the hopeless alternative to the producers.

Through the possession of these pipe lines, therefore, and the contract method of transferring the title at the wells as a condition of transportation, the Standard Oil Company was able to *compel* the signing of the agreements by the well owners. No refiner or dealer could go into the field and buy the oil, as is done for instance by millers and dealers in the grain-producing-territory, for the cost of transportation by rail was too great to permit of such buying. The producer, therefore, must either allow his oil to go to waste or sell it at the price which the Standard Oil Company was willing to give. Taking the situation

as it existed in 1906, when this legislation was enacted, it is absurd to say that these prices were fixed by any *subordinate organization*. The Standard Oil Company [fol. 1061] dominated the situation. These producers were compelled, by the artificial conditions created by the Standard Oil Company, to deliver their oil at the arbitrary price fixed by that company. While the Standard Oil Company, through its pipe line companies, owned a few wells, the production from these wells was small and unimportant. They were simply used to give some semblance of reason to the theory that the pipe line companies were *producers* of oil. So long as they could hold these thousands of producers in the oil fields in subjection, and compel them to deliver their oil at the Standard's prices, the Standard Oil Company had no reason or incentive to bore, and experiment with oil wells. It was safer and cheaper to enslave the producers.

The Standard Oil Company had, by these methods, obtained the title to and control of 85 per cent of the oil produced. It held the field by virtue of the fact that it controlled existing pipe lines and, by its contracts, fixed the price of the entire output of crude oil. To organize any effective competition was practically impossible; in fact no one was interested in doing this except the producers, and they are men of very small means.

Independent refiners.—The ownership of the pipe lines and the monopoly of the crude oil enabled the Standard Oil Company to determine practically the quantity that it would allow the existing independent refineries to consume, and to fix the price of crude oil to them. This [fol. 1062] condition effectually prevented the building of competing refineries.

Monopoly.—Considering the condition existing at the time this legislation was enacted, the following results were inevitable, namely, (1) the Standard Oil Company controlled and arbitrarily fixed the price of crude oil at the wells; (2) no independent refinery in the East could secure crude oil except from the Standard Oil Company; and (3) the quantity accorded to the independent refineries, and the price they must pay for it, were fixed arbitrarily by the Standard Oil Company. With these three "grips" the Standard Oil Company held a complete monopoly of the oil industry by *artificially created* conditions. Considering this situation, created by this combination and con-

spiracy of the Standard Oil Company, the language of the Commerce Court is strangely at variance with the language of this court. In the opinion of the Commerce Court (p. 36), that court said:

> But how does the possession of a private pipe line by one of many oil producers or dealers take from the others any privilege or opportunity which is rightfully theirs or which they are justly entitled to share with the more fortunate owner? Of what right can they be said to be deprived, or in what respect are they subjected to any injury or disability which is illegal?

And on pages 38, 39:

> It is only repeating to say that the private use by petitioners of the pipe lines in question has no relation [fol. 1063] to monopoly, and in no correct sense of the word tends to monopoly, since such use does not exclude others from any privilege which is rightfully theirs and involves only that exclusion which is inseparable from the possession and enjoyment of private property.
>
> It may be that the greater number of oil producers *are virtually compelled* to sell their output to the owners of private pipe lines, because they are unable or unwilling to build pipe lines of their own, or because there are no common-carrier pipe lines to which they have access. * * *

This court, in the Standard Oil Company case, *supra*, said (pp. 76-77):

> The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a convic-

tion of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

[fol. 1064] The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

Public markets.—Referring again to the contract signed by the producers by which they dispose of their oil to the Standard pipe lines, it will be observed that the pipe line companies *measure and grade the oil in their own way and by their own agents.* They take all the oil offered. Considering in this connection the fact that practically all of the oil produced is measured and gauged by, and sold to, the pipe lines, it follows that these are the public markets *and the only public markets* for this enormous domestic product. Through these practices, carried on by the Standard Oil Company and these pipe lines, markets were established and maintained in every field of production and presided over by this monopoly. This court, in *W. W. Cargill Co.* [fol. 1065] v. *Minnesota ex rel. Railroad & W. Com.* (180 U. S., 452, 462-465), speaking through Mr. Justice Harlan, said:

> The defendant company during the period mentioned never received into, or shipped from, or handled or deposited or in any way stored in the warehouse any grain in which any other person or persons had any property, title, right, or interest; * * *. But the warehouse was used, occupied, and operated by the defendant solely for the purpose of receiving, handling, and shipping its own grain in its private capacity as grain owner and merchant.

> * * * It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded, and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as market-master, weighmaster, inspector, and grader of the grain. *Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State.*

Right of way.—As already noted, pipe lines for the transportation of oil are of recent origin. When the construction of these lines began, no State in the Union had any statute [fol. 1066] providing for the organization of such lines or for the exercise of the power of eminent domain by them. The statutes upon these subjects which now exist in many States are of comparatively recent origin. In the beginning the pipe lines were compelled to acquire right of way by private contract.

The exercise of the power of eminent domain is not essential to *create* a "public interest" in or right to regulate a business of transportation. The possession of this power is not essential to make a corporation *quasi public* in character. Express companies, sleeping car companies, electric light and power companies, telegraph companies, and others are *quasi public* corporations, but do not possess the power of eminent domain.

Franchises.—To construct pipe lines it was and is essential that public franchises be accorded them. These pipe lines cross hundreds of public highways and streets. A contract for such a right "from the abutting owners" can not deprive the State or municipality of its superior sovereign right over the highway or street. The State or municipality can compel the changing or the removal of these pipes if they are regarded dangerous to the public. The construction and maintenance of these pipe lines upon these highways and streets is by public consent, and such consent is absolutely essential to such construction. These lines run

many hundred miles through a thickly settled portion of the country and necessarily cross or run upon hundreds of roads and streets. These privileges are not granted to a purely [fol. 1067] private business. This is not therefore a private business that can be carried on independently of governmental franchises.

These pipe lines cross and in some instances run upon rights of way of railroad companies whose rights of way have been secured under public authority. The Prairie Oil & Gas Company runs 300 miles upon the right of way of the Atchison, Topeka & Santa Fe Railway. Some of the other appellees enjoy similar privileges. These privileges, whatever the contract may be with the railroad company, are subject to the same obligations and burdens, as far as the public is concerned, that the right of way of the railroad company is subject to. These pipe lines are no less public because they operate upon these rights of way by contract with the railroad company than are telegraph, express, or sleeping car companies. Whatever rights inhere in the public in one case exist as to the other.

Some of these pipe lines run upon parts of the public domain. The privileges were granted by the United States Government, acting through the Interior Department, under regulations provided by law. By statute Congress provide for the granting of rights of way to pipe lines through Indian and public lands by the Secretary of the Interior. (33 Stat. L., 65.)

A "franchise" is defined to be "A special privilege emanating from the Government and vested in an individual or a body politic and corporate, *which is not possessed by* [fol. 1068] *citizens generally.*" Using this general definition, it is clear that these rights over public highways, streets, railway rights of way, and the public domain are franchises within the meaning of the law and were and are granted to these pipe lines because of the public interest in the transportation which these lines are organized to carry on.

Eminent domain.—In nearly all the States interested in the production and transportation of oil statutes have been passed conferring upon pipe-line companies the power of eminent domain. Any one of these companies may now exercise that power in its State. This power is only granted to *quasi-public* corporations; not for the purpose of making the corporations *quasi public*, but in recognition of the fact

that they are performing a service in which the public is interested and to enable them, by reason of the public interest, to carry on successfully their business. This extraordinary power is called into action only in cases where the companies can not agree with the owners of property needed in the construction of transportation lines. In most cases there is agreement as there was in these cases. The charter of each of these pipe lines, in naming the purposes for which the corporation is organized, states, in a definite form, *the transportation of oil*. The public is interested in this transportation business, and therefore has aided these companies by granting to them the usual privileges accorded to transportation companies.

[fol. 1069] Particular Facts Regarding Each of the Appellees

No. 481

The Ohio Oil Company is organized under the laws of the State of Ohio, with a capital stock of $15,000,000, of which $14,999,850 was owned by the Standard Oil Company; it owns and operates, under lease and otherwise, a trunk line from the Lima-Indiana field in Indiana, to Centerbridge, in the State of Pennsylvania; it acquired its right of way by contract over lands traversed, and crosses public highways by municipal grants or permission; it purchases crude oil and transports the same through its pipe lines, delivering the oil to the Standard Oil Company of New Jersey at Centerbridge. The price of the crude oil at the wells is arbitrarily fixed by the pipe-line company; its purchases, sales, and deliveries to the Standard Oil Company are conducted substantially in the same manner as are the transactions of the Prairie Oil & Gas Company and other Standard Oil pipe lines. Its charter expressly authorizes it to *transport* oil.

No. 482

The Standard Oil Company was incorporated under the laws of the State of New Jersey August 5, 1882. The facts concerning the capitalization and holdings of this company, in 1906 and subsequently, were judicially determined in *Standard Oil Company* v. *United States* (221 U. S., 1). The bill in that case was filed November 15, 1906, and shows the conditions in the oil industry existing at that time. The

[fol. 1070] Standard Oil Company was originally a holding company and acquired the majority, and in many cases all, of the stocks of "various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and the District of Columbia, and with foreign nations"; in January, 1899, the charter was amended so that the business and objects of incorporation included, among other things, "transporting goods and merchandise by land or water in any manner." This company succeeded to all of the holdings of the Standard Oil Company of Ohio, which company was, by the Supreme Court of Ohio, on March 2, 1892, adjudged to be an unlawful monopoly in restraint of trade. Among the forty corporations whose stocks, or a majority thereof, were transferred to the Standard Oil Company was the total stock of the National Transit Company; this stock was held by the Standard Oil Company at the time of the entry of the decree in the Standard Oil Company case, *supra*. (Rec. No. 482, p. 73.)

The petition herein states, and the decree in the Standard Oil case shows, that the Standard Oil Company also had transferred to it certain refineries, or the stocks thereof, formerly owned by the Standard Oil Company of Ohio, located at Bayonne, N. J., Baltimore, Md., and Jersey City, N. J. The National Transit Company was organized under a special charter granted by the State of Pensylvania "to take over such of the pipe lines belonging to or held for the [fol. 1071] Standard Oil Company of Ohio or its stockholders as might be transferred to it; that under the terms of its charter the National Transit Company was then, and has always been, a common carrier within the State of Pennsylvania." (Rec. No. 482, p. 3.)

The Transit Company acquired, in 1882, and operated until May 1, 1894, two main trunk pipe lines for the transportation of crude oil to the Standard Oil Company's refineries aforesaid; one line extended from the Appalachian field through the State of Pennsylvania to Philadelphia, with a branch line extending from the main line to Baltimore, in the State of Maryland, and another branch line extending from its said main line to Bayonne, in the State of New Jersey. The second trunk line extended from the Appalachian field through the State of New York and the State of New Jersey to Bayonne. In 1890 the State of New York passed an act providing for the incorporation of pipe-

line companies, making them common carriers. About May 1, 1894, the Standard Oil Company organized the New York Transit Company under the laws of the State of New York, and caused the said trunk line, extending through New York to Bayonne, New Jersey, to be conveyed by its National Transit Company to the newly organized New York Transit Company. The entire stock of the New York Transit Company was issued to and held by the Standard Oil Company. (Rec. No. 482, p. 73.) After May 1, 1894, the National [fol. 1072] Transit Company and the New York Transit Company, both common carriers by virtue of their charters and the laws of the States under which they were organized, owned as aforesaid, and operated the two trunk lines and branches for the purpose of supplying the refineries of the Standard Oil Company at the points named with crude oil.

Pending the legislation by Congress in controversy, requiring pipe lines to be common carriers and to file their tariffs with the Interstate Commerce Commission, "about November 3, 1905," the petition herein alleges, "the boards of directors of the National Transit Company and the New York Transit Company, respectively, passed resolutions authorizing the sale to petitioner (Standard Oil Company) of all their said pipe line properties in New Jersey and Maryland, and that thereafter, on or about July 17, 1906, deeds conveying said properties were duly executed and delivered to petitioner, with the exception of the deeds for certain small pieces of land which were overlooked at the time of the original transfer, and were executed and delivered to the petitioner in 1908 on the discovery of the oversight; and that the operation of said properties was taken over by your petitioner in August, 1906." (Petition, Rec., No. 482, p. 4, paragraph 8.) At the time this transfer was made the States of New Jersey and Maryland did not require pipe line companies to be common carriers. The eastern ends or parts of the trunk lines above described, conveyed to the Standard Oil Company, extend (1) from [fol. 1073] Unionville, on or near the boundary line between New York and New Jersey to Bayonne, N. J., and Brooklyn, N. Y.; (2) from Centerbridge, at or near the boundary line between the States of Pennsylvania and New Jersey, to Bayonne and Baywater; and (3) from Fawn Grove, at or near the boundary line between Pennsylvania and Maryland to Baltimore; all these lines connecting with refineries

and storage tanks of the Standard Oil Company. (See map.)

There are no oil wells producing crude oil at either Unionville, Centerbridge, or Fawn Grove, nor are there any refineries or consumers of crude oil at said points or either of them. Although the National Transit Company and the New York Transit Company were common carriers by virtue of their organization by the laws of the States under which they were organized, yet by virtue of the control exercised by the Standard Oil Company over these companies no oil was shipped through them except for its refineries at Bayonne, Philadelphia, and Baltimore or for export by the Standard Oil Company. The conveyance of these ends of the trunk lines to the Standard Oil Company was for the purpose of placing the title to said pieces in a corporation not required to be a common carrier by the law of the State in which it was incorporated, and to avoid, if possible, the effect of the act of Congress in controversy requiring carriers of oil by pipe lines to file tariffs with the Interstate Commerce Commission, and also to limit the transportation of oil through the trunk lines of the National [fol. 1074] Transit Company and the New York Transit Company to oil carried for the Standard Oil Company. By controlling the eastern ends of these trunk lines no refinery situated upon the seaboard could take advantage of the requirement that the National Transit Company and the New York Transit Company should be common carriers, and secure crude oil from the Appalachian field, as the Standard Oil Company claimed to be a private carrier carrying only its own product and refused to receive oil at Unionville, Centerbridge, or Fawn Grove for other refiners. There was in fact no change of *actual* ownership of these pieces of pipe lines. The two transit companies were wholly owned and controlled by the Standard Oil Company. The Standard owned and operated these pipe lines just as completely before the transfer to it as it did afterwards. Practically there was no difference in the ownership, and there was not, and could not be, any object in making the transfer other than an attempt to circumvent the pending legislation by Congress.

The Standard Oil Company receives crude oil transported to and for it from the western fields through the system of pipe lines shown upon the map referred to. It refuses to receive crude oil not transferred to it under the terms and

conditions above set forth. By means of its pipe lines and those controlled by it, particularly as set forth in this appellant's answer (Rec. No. 482, p. 61), it held, in 1906, a practical monopoly of the oil production and trade of the United States.

[fol. 1075] No. 483

The Standard Oil Company of Louisiana was organized under the laws of Louisiana in April, 1909, and commenced business after the commencement of the suit to dissolve the Standard Oil Company; its charter provides that it may *transport* oil.

It owns and operates a refinery at Baton Rouge, in the State of Louisiana, and a trunk pipe line extending from the northern State line to Baton Rouge. It has gathering lines in the Caddo field; it purchases about one-third of its oil from the Mid-Continent field, which is delivered to it by the Prairie Oil & Gas Company, the transportation being a through transportation from the Mid-Continent field to its refinery; the last-named company takes the title to the oil at the wells and transfers it to the Standard at the point of connection. No oil is transported through either line that is not purchased for the refinery at Baton Rouge. Its business is conducted upon precisely the same lines and bases as the other Standard Oil Companies.

No. 506

The Prairie Oil & Gas Company is organized under the laws of the State of Kansas, and it is authorized to explore for, mine, produce, purchase, store, sell, and *transport* petroleum oil.

By a decree of the Supreme Court of the State of Kansas (Exhibit B to answer I. C. C. Rec. 506, pp. 22 to 25) it is enjoined from manufacturing, storing, selling, or market-[fol. 1076] ing refined petroleum oil, and from "*making or carrying out any arrangements, contracts, agreements, understandings, trusts, or combinations, with a view or which tend to advance rates or control the price or the cost to the producer or to the consumer or to prevent the full and free competition in the importation, transportation, manufacture, or sale of crude petroleum.*" Its present authorized capital is $20,000,000, of which the National Transit Company held $17,797,400 (increased from $10,000,000,

Dec. 11, 1907); the Standard Oil Company owned and held the stock of the Transit Company at the time of the dissolution of the Standard Oil Company. (See copy of the supplemental decree dissolving the Standard Oil Company of New Jersey, Exhibit A to I. C. C. answer Rec. 482, pp. 71 to 77.) This stock was distributed, under the decree, to the stockholders of the Standard Oil Company.

The Prairie Oil & Gas Company owns and operates pipe lines consisting (*a*) of gathering lines in the Mid-Continent field, in the States of Kansas and Oklahoma, (*b*) a trunk line from the Mid-Continent field to Whiting, in the State of Indiana, where it connects with the Indiana pipe line, and (*c*) a trunk line in the State of Arkansas, connecting the Oklahoma pipe line with the pipe line of the Standard Oil Company of Louisiana. (All particularly shown upon the map, Exhibit C to this appellant's answer.) It has about 860 miles of trunk line, its total mileage approximating 3,000 miles (single pipe). The right of way for its trunk [fol. 1077] lines was secured by contract over all property which it traverses; but these modifying facts are stated in the answer:

(1) About 300 miles of the trunk line to Whiting is on the right of way of the Atchison, Topeka & Santa Fe Railway; this right of way was acquired by contract with the railroad Company and, it is claimed, with the abutting owners of the fee.

(2) Its right of way through the Indian lands in Oklahoma was secured by public grant upon application to the Interior Department, in accordance with an act of Congress approved March 11, 1904 (33 Stat. L., 65), and subject to the regulations of the department.

(3) By public grants or permission from State and municipal authorities, it crosses many public highways and streets.

This company stored and transported through its pipe lines in 1910 about 80 per cent of the total production of crude oil in the Mid-Continent field; it offers to connect its line and take oil from any and all producers in that field upon the condition (1) that the title to the oil vest in the pipe-line company immediately upon its being gauged and delivered into its gathering pipes, and (2) that the producer accept the arbitrary price fixed and posted at the

wells by the pipe-line company. It measures and gauges the oil at the wells. Through its pipe lines and connecting pipe lines oil is purchased for and delivered to the refineries owned, operated, or controlled by the Standard Oil Company of New Jersey. The price paid by the refineries for the crude oil so delivered is fixed by the refinery, and [fol. 1078] includes the cost of transportation.

The fields of production, refineries, and pipe lines are particularly shown upon the map referred to. This company has, in its storage tanks and pipe lines, accumulated oil amounting to 40,000,000 barrels, and has standing agreements for future delivery to the refineries named amounting to 100,000 barrels per day. It produces from its own wells about 11,557 barrels per day, and has outstanding obligations to purchase from well owners about 79,000 barrels per day.

No. 507

The Uncle Sam Oil Company was incorporated under the laws of the Territory of Arizona for the purpose of producing, *transporting*, refining, and marketing oil. It is not one of the Standard Oil group. It operates oil wells in the Osage Indian Reservation in the State of Oklahoma, and a refinery at Cherryvale, in the State of Kansas. It owns and operates a pipe line, with storage tanks, from its wells in the reservation in the State of Oklahoma to its refineries in Cherryvale, Kansas. Through the agency of a selling corporation, the capital stock of which it owns, it ships its refined product in tank cars, owned by it, from its refinery at Cherryvale to stations owned by it in the State of Missouri. Its right of way for its pipe line was secured by contract over the lands traversed by it, and by permission of the Interior Department over Indian [fol. 1079] lands; it crosses public highways by grant or permission of the public. Its charter permits it to *transport* oil as a common carrier. This company is constructing new lines to other points which will soon be open for traffic.

No. 508

The Tide-Water Pipe Company, Limited, is a partnership created under the laws of the State of Pennsylvania. It has a capital stock of $625,000, for which certificates are issued only to members. It owns and operates a trunk pipe line from the Appalachian field on the western line of the

State of Pennsylvania to Bayonne, in the State of New Jersey. The company also owns and operates branches from the Allegheny and New York field, and branches through McKean County, Pa., and also a line extending from Stoy, Crawford County, Ill., through the States of Illinois, Indiana, Ohio, and Pennsylvania. This pipe line crosses, at the Pennsylvania State line, the Buckeye pipe line. It purchases oil in the Appalachian field, and receives oil from connecting lines from other fields, which it transports to the Tide-Water Oil Company refinery at Bayonne, New Jersey. This refining company has an outstanding capital of $24,000,000.

This company refuses to take any oil into its pipes for transportation except upon condition that the title is transferred to the company at the company's posted prices. The Standard Oil Company of New Jersey has an interest of 31 per cent in said partnership and is represented by H. C. [fol. 1080] Folger, jr., and holds the same proportion of the stock of the refining company.

Conclusions of Fact

The general and particular facts above set forth show:

(1) That all of the appellee companies are organized and by their charters are authorized, to construct and operate pipe lines and transport oil.

(2) That each of the appellee companies is engaged in the transportation of oil "among the several States."

(3) That the public, through the United States, State, and municipal governments, recognizing the public interest in this business, has granted valuable franchises to each of these companies.

(4) That said appellee companies have established and maintain public markets for the sale of crude oil.

(5) That the oil produced in the United States and transported by these companies is of the value of $150,000,000 and the public is interested in this transportation.

(6) That this transportation, in connection with the methods by which it is carried on, vitally affects thousands of producers of crude oil in the United States, and arbitrarily fixes the price of crude oil.

(7) That this transportation and these practices affect and restrict independent refineries in the United States, and enable the favored refiners to arbitrarily fix the price of refined oil.

(8) That this transportation in connection with these practices affects millions of consumers in the United States [fol. 1081] and tends to, and does, create a monopoly in petroleum.

Therefore, this business *is affected with a public interest;* it is *interstate commerce;* and we shall now contend that Congress has complete Constitutional power to regulate it in the manner provided in the act of 1906.

Questions of Law

I

Is the business of the appellees affected with a public interest to an extent that the business ceases to be *juris privati* only?

It is not necessary that a person carrying on a business "hold himself out" to serve the public in order to charge the business with a public interest. The business in its beginning may be purely private, but so develop, through design or by evolution, that the public must avail itself of the advantages furnished. It may become a virtual monopoly. In either case it ceases to be *juris privati* only and becomes "affected with a public interest," subject to regulation.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain.

"A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all [fol. 1082] shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. R. Co., 27 Vt. 143, but it does authorize the establishment of laws requir-

ing each citizen to so conduct himself and so use his own property as not unnecessarily to injure another.

* * * * * * *

Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.

* * * * * * *

Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest it ceases to be *juris privati* only." This was said by *Lord Chief Justice* Hale more than two hundred years ago in his treatise *De Portibus Maris*, 1 Harg. [fol. 1083] L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest *when used in a manner to make it of public consequence and affect the community at large*. When, therefore, one devotes his property to a use in which the public has an interest, he, *in effect*, grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use*, but so long as he maintains the use he must submit to the control.

Lord Chief Justice Hale, in his treatise *De Portibus Maris*, distinguishing between a public and a private wharf, the former of which can be regulated, says:

> If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the Queen, * * * *or because there is no other wharf in that port, as it may fall out where a port is newly erected*; * * * the wharf and crane and other conveniences are effected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in a new building on his own land, it is now no longer bare private interest, but is affected by a public interest.

Lord Ellenborough, in *Allnut* v. *Inglis*, 12 East, 527, 539 (decided in 1810), referring to the language of Lord Hale, said:

> [fol. 1084] *It is enough* that there exists in the place and for the commodity in question a *virtual monopoly* of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to (that from *De Portibus Maris* already quoted), which includes the good sense as well as the law of the subject.

And in the same case Le Blanc, *J.*, said (p. 541):

> Then *admitting these warehouses to be private property*, and that the company might discontinue this application of them, or that they might have made what terms they pleased *in the first instance, yet having, as they now have, this monopoly*, the question is whether the warehouses be not private property clothed with a public right, and if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, it is not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? * * * But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a

public interest it ceases to be *juris priviti* only, and in case of its dedication to such a purpose as this, the owners can not take arbitrary and excessive duties, but the duties must be reasonable.

The foregoing statements of the law are set forth in Munn *v.* People of Illinois (94 U. S., 113, 154), as "the [fol. 1085] principles upon which this power of regulation rests."

In *Munn* v. *Illinois, supra,* the constitution of Illinois, adopted in 1870, provided, in article 13, section 1, that "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are *declared to be public warehouses.*"

An act of the Legislature of Illinois, approved April 25, 1871-2 (Pub. Laws of Ill., p. 762), divided public warehouses into three classes, prescribed the taking of a license, the giving of a bond, and fixed the maximum charge for warehouses belonging to class A, for storing and handling grain, including the cost of receiving and delivering, and imposed a fine on conviction for not taking a license, or not giving the bond.

Munn and Scott were indicted, convicted and fined for not taking out the license, and not giving the bond, and for charging rates for storing and handling grain higher than those established by the act. They were the managers and lessees of an elevator constructed and operated "by private individuals, who have embarked their capital and devoted their industry to such business as *a private pursuit*"; the elevators were erected at the points where transportation by water on the lakes meets the rail transportation for the East; these elevators elevated the grain from the ships into the elevator, mixed and graded the grain and delivered it into the cars.

This court, speaking through Mr. Chief Justice Waite, said:

> [fol. 1086] This mode of conducting the business was inaugurated more than twenty years ago and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has therefore been by private individuals who have embarked their capital and

devoted their industry to such business as a private pursuit.

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business and owned by about thirty persons, nine business firms controlled them and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the seashore" *may* be a "*virtual*" *monopoly.*

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman pursues a public employment and exercises "a sort of public office," [fol. 1087] these plaintiffs in error do not. • • • Certainly if any business can be clothed "with a public interest and cease to be *juris privati only*" this has been. It may not be made so by the operation of the constitution of Illinois or this statute, *but it is by the facts.*

Referring to the provisions of the constitution of Illinois and the legislation thereunder, the court further said:

This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.

For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded [fol. 1088] that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.

* * * * * * *

We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

* * * * * * *

It matters not in this case that these plaintiffs in error had built their warehouses and established their business *before the regulations complained of were adopted.* What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good.

* * * * * * *

It was very properly said in the case of the *State Tax on R. Gross Receipts,* 15 Wall., 293 (82 U. S. XXI, 167), that "It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illi-

nois. They are used as instruments by those engaged in State as well as those engaged in interstate com- [fol. 1089] merce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their interstate relations the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.

The doctrine laid down in *Munn* v. *Illinois* has been followed by this court and the supreme courts of many States of the Union. It came up for reexamination and review by this court in *Budd* v. *State of New York*, 143 U. S. 517, 552. In the opinion in the Budd case, many extracts from the opinion in the Munn case are set forth, many State cases are reviewed which had followed the Munn case, and the doctrine in the Munn case is reaffirmed.

In *Budd* v. *State of New York, supra*, an act of the State of New York was under consideration. The act provided that—

> SECTION 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State shall not exceed the following rates, namely:

Then follows certain rates, concluding as follows:

> and canal boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the [fol. 1090] elevator when unloading, and trimming cargo when loading.

The act provided fines and penalties for violation of the law.

Budd was indicted for a violation of the act, he being the manager of the Wells Elevator in Buffalo, which was an elevator and warehouse for receiving and discharging grain in the city of Buffalo.

The defense was that the services rendered by Budd, for which the statute assumed to fix the price, were not public in their nature; that neither the persons rendering them nor the elevator in question had received any privilege from the legislature, and that such elevator was not a public warehouse and received no license.

This court, speaking through Mr. Justice Blatchford, said:

> We must regard the principle maintained in *Munn* v. *Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing, and discharging the grain, as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading, and trimming the cargo when loaded.
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> * * * * * * *
>
> We are of opinion that the act of the legislature of New York is not contrary to the 14th amendment to the Constitution of the United States and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges [fol. 1091] which it specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof; and that it is a proper exercise of the police power of the State.
>
> On the testimony in the cases before us, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community *analogous to that of common carriers.*
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> * * * * * * *
>
> In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible.
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> * * * * * * *
>
> The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted

by its owner, who engaged in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

In *Sinking Fund Cases*, 99 U. S., 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn* v. *Illinois*, speaking of that case (dissenting opinion), said:

> The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance [fol. 1092] as to create a common charge or burden upon the citizens; in other words, *when it becomes a practical monopoly, to which the citizen is compelled to resort* and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354, a case where a *private* water company was required to furnish water at rates fixed by a statute, this court, speaking through Mr. Chief Justice Waite, said:

> That it is within the power of the Government to regulate the prices at which water shall be sold by one who enjoys a *virtual monopoly* of the sale we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois*, 94 U. S. 113. As we said in that case, such regulations *do not deprive a person of his property without due process of law*.

In *Dow* v. *Beidelman*, 125 U. S. 680, 686, this court, speaking through Mr. Justice Gray, said:

> In *Munn* v. *Illinois*, * * * after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," the Chief Justice said: "To limit the rate of

[fol. 1093] charges for services rendered in public employment, or for the use of property in which the public has an interest, only changes a regulation which existed before. It establishes no new principle in the law, but only gave a new effect to an old one."

The Supreme Court of Ohio said:

> Where the owner of property devotes it to a use in which the public have an interest, he *in effect* grants to the public an interest in such use, and must, *to the extent of that interest*, submit to be controlled by the public, for the common good, so long as he maintains the use.
>
> (*State* v. *Columbus G-L. & C. Co.*, 34 Ohio State, 572-582.)

The legislature may fix maximum charges for services in which the public has an interest, even when such persons have derived no special privileges from the State. (*Ruggles* v. *People*, 91 Illinois, 256-262.)

In Alabama, a statute declaring it unlawful within certain counties, to transport or move, after sunset and before sunrise of the succe-ding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. It was claimed that the statute was a despotic interference with the rights of private property, and its practical effect a deprivation of ownership without due process of law. The court said that the statute sought only to regulate and control the transportation of cotton in one particular condition [fol. 1094] of it, and was a mere police regulation to which there was no constitutional objection; "that the object of the statute was to regulate traffic in the staple agricultural product of the State, so as to *prevent a prevalent evil*, which, in the opinion of the lawmaking power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory." (*Davis* v. *State*, 68 Ala. 58.)

Nothing is better established than the power of the legislature to make what are called "police regulations," declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and

benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. (*Sawyer* v. *Davis*, 136 Mass. 239.)

In a telephone case it was held that when corporations or persons assumed and undertook to supply a public demand made necessary by the requirements of the commerce of the country, such as a public telephone, they were subject to regulation. (*Webster Telephone Case*, 17 Neb. 126. (See also *Hockett* v. *State*, 105 Ind., 250, 258.) *Chesapeake & P. Teleph. Co.* v. *B. & O. Teleg. Co.*, 66 Md. 399, 414.)

A telephone company "not possessed of any special privileges under the statutes of the state" and operating under

> no law giving it a monopoly of the business in the terri- [fol. 1095] tory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of the respondent, from the very nature and character of its business, gives it a monopoly of the business which it transacts. No two companies will try to cover the same territory. The demands of the commerce of the present day make the telephone a necessity.
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> * * * * * * *
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> "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, can not be questioned. * * * It has assumed the responsibilities of a common carrier of news. It has and must be held to have taken its place by the side of the telegraph as such common carrier. * * * It is affected with a public interest, it must supply all alike, who are alike situated, and not discriminate in favor of or against any. *State* v. *Nebraska Telephone Co.*, 22 N. W. Rep., 237.

In a controversy between proprietors of tobacco warehouses in the city of Louisville and large dealers in tobacco, it was held that—

> Such warehouses have been always regulated by law for the benefit of the producer, as well as those who are the proprietors of these warehouses, and the latter have

assumed an obligation to the public that exists so long as they continue public warehousemen. They have assumed a *quasi* public character under the protection [fol. 1096] of the law, and will not be allowed to exercise all the privileges that have heretofore belonged to warehousemen, and evade all the duties and responsibilities of their position by the passage of a resolution disclaiming that they are operating their houses in the capacity of warehousemen, but as commission merchants.

They pursue the same business, without any change as to the manner of selling or of conducting their warehouses, claiming only the exercise of a private right, and an entire exemption from the discharge of a public duty.

* * * * * * *

While the warehouse is the private property of the owner it has been devoted to a public use and is controlled and regulated in the conduct of its business for the protection of this great interest. (*Nash* v. *Page*, 80 Ky., 539; 44 Am. Rep., 490.)

In a case involving the right of the Associated Press to discriminate between newspapers, the Supreme Court of Illinois held:

Where one is the owner of property which is devoted to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse, and the public interest in such use may be of a widely variant character; but where the use is one in [fol. 1097] which the public in interested, or has an interest, public control is necessary for the common good.

* * * * * * *

Appellee would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish, and could prejudice the interests of the public. Such a power was never contemplated

> in its creation and is hostile to public interests. * * * Its tendency, therefore, is to create a monopoly in its own favor, and to prevent its members from procuring news from others engaged in the same character of work, and such provision is illegal and void. (*Inter-Ocean Publishing Co.* v. *Associated Press*, 184 Ill. 438; 48 L. R. A. 568.)

The Board of Trade of the City of Chicago has for its objects the maintenance of a commercial exchange; securing uniformity in the customs and usages of merchants; acquiring and disseminating valuable commercial and economical information, etc. The growth of the association made it of great local and national importance as a trade center. The Western Union Telegraph Co. occupied an office in the exchange. The board by a rule undertook to control the market reports sent out with a view to limiting the information to correspondents approved by the board. A correspondent of the telegraph company, being threatened with having his service cut off, filed a bill for an injunction.

The contention of the board of trade was that it is a strictly private corporation; that the market news and statistics collected and compiled are private property of the [fol. 1098] association which it had the legal right to control, etc. The Supreme Court of Illinois held that:

> The board of trade is a private corporation, and it was incorporated for the purpose of affording facilities to its members in doing business with each other. In their transactions upon the floors of the exchange they deal as principals with each other, but in respect to the outside world they are brokers and commission merchants for the producers, consumers, shippers and merchants whom they represent. * * * it has become of vast commercial influence and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world.
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> * * * * * * *
>
> In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products

as fixed and determined on the board of trade; and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the board of trade and the telegraph companies.

This market news is a species of property; * * * it may be it would have been strictly private property held in trust by the board for the use and benefit of such members and wholly free from any public interest [fol. 1099] therein. But the board did not so exercise its franchises and so conduct its business, but admitted the telegraph companies to the floor of its exchange and permitted and encouraged them from day to day and year after year to gather these statistics of the dealings on the board and telegraph them immediately as they were made, throughout the land, * * * and all persons dealing in such products could not without the knowledge and benefit of these immediate quotations intelligently and safely so deal.

The facts that the board of trade is a private corporation and that the dealings between its members are private business, such as is transacted between dry goods, grocery and commission merchants, and that the statistics of these dealings collected as we have stated are private property, are not conclusive that such statistics are not charged with a public interest and that there is no duty due the public in respect thereto.

* * * * * * *

Assuming that these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board and by the telegraph companies with the knowledge and consent of the board as to become affected with a public interest, then they are subject to such public regulation by the Legislature and the courts as is necessary to prevent injury to such public interest.

* * * * * * *

We think the case made by the bill of complaint and the proofs brings it within the rule announced by the

[fol. 1100] Supreme Court of the United States in *Munn v. Illinois, supra.*

(*New York & Chicago Grain & Stock Exchange* v. *Chicago Board of Trade*, 127 Ill., 153; 2 L. R. A., 411.)

Franchises.—As already stated, these pipe lines are possessed of certain public franchises. They cross with their pipes innumerable highways and streets, a privilege that does not pertain to a strictly private business and is not enjoyed by citizens generally. These lines could not exist without these privileges any more than a railroad could exist without them. Some of the lines run upon the rights of way of railroads; all of them cross or run under these rights of way. These railroad rights of way are all obtained by public authority and are subject to a public control. Some of the lines cross or run upon the public domain and Indian lands by special grants. These are special privileges granted under an act of Congress and limited to pipe lines; these privileges are not possessed by citizens generally, and can only be enjoyed by the person or corporation who is building and intends to maintain a pipe line for the transportation of oil.

The line of decisions is well understood which hold that *quasi-public* corporations and public utility companies receiving such grants, privileges and franchises are subject to Governmental regulation.

Public markets.—A statute of Minnesota declared that "All elevators and warehouses in which grain is received, stored and shipped or handled, and which are situated on [fol. 1101] the right of way of any railroad, depot grounds, or any lands acquired or reserved by any railroad company" to be public elevators, and to be under the supervision and subject to the inspection of the Railroad & Warehouse Commission of the State of Minnesota. Penalties were provided in case of a failure to comply with the act. A firm operating such a warehouse, strictly for their own purposes, was charged with a violation of the statute. The case came to this court, and the court, speaking through Mr. Justice Harland, said:

> The State court well said that the defendant's warehouse could be fairly regarded as "a sort of public market where the farmers come with their grain for

> the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain." We cannot question the power of the State, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits,—such a license not being required for the purpose of forbidding a business lawful *or harmless* in itself, but only for purposes of regulation. (*W. W. Cargill Co.* v. *Minnesota ex rel. Railroad & Warehouse Commission*, 180 U. S., 452, 467-468.)

That is precisely what these pipe lines do. By their own agents they grade, measure, and purchase the oil. There are no other markets at which the producer can sell his oil. [fol. 1102] They are the public markets and the only public markets for crude oil. These markets are presided over and absolutely controlled by the pipe lines.

Extent of regulation.—The foregoing cases establish beyond any question that corporations exercising a business affected by a public interest, enjoying public franchises; controlling public markets; fixing the prices of commodities, and which are "virtual monopolies," are subject to governmental regulation. It only remains to determine to what extent this regulation may be carried.

It will be observed that running through all of these cases the doctrine, stated in various forms, is that these corporations "must submit to be controlled by the public for the common good, to the extent of the interest" which the public has in the business. The public is interested in various ways. It is interested in having reasonable rates for the services rendered; in having proper and good facilities; in having prompt and efficient service; equality of charges and service to all citizens alike; in having the business so conducted as — to endanger human life, or spread disease or immorality, *or create monopoly*. To prevent these evils, or any one of them, by regulation is within the power of the Government having control over the subject matter. Each case arising must be analyzed and a determination reached as to what the particular interest of the public is in the business, and what the evil is that is to be eradicated or from which the public is to be pro- [fol. 1103] tected. If it falls within any of the enumerated

cases for the exercise of Governmental regulation, then the regulation must be effective; it must eradicate the evil; it must protect the public against an imminent danger or an existing oppression. Having determined what that evil is the Government may, through its legislative body, adopt any measures that are convenient or expedient and which have direct relation to the matter to be controlled.

But it may be said that while it is true that the States of the Union, exercising a police power, may adopt such regulations, it is not within the power of Congress to do so. But it has been repeatedly held that in regulating, under the power conferred by the commerce clause of the Constitution, Congress may do everything for the protection of life, health, morals and property, and the destruction of monopoly that a State could do under its police power. The safety appliance act, the employers' liability act, the anti-trust act, the act for the suppression of lottery traffic, the pure food and drugs act and the white slave act, all sustained by this court, rest primarily and fundamentally upon the power of Congress, acting under the commerce clause, to do anything and everything that a State can do regarding the same general subject under its police power.

> It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat., 512, c. 172. *United States* v. *Popper*, 98 Fed. [fol. 1104] Rep., 423. It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. *Lottery Case*, 188 U. S., 321, 357. It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in *Reid* v. *Colorado*, 187 U. S., 137. This constitutes the supreme fallacy of plaintiffs' error. It pervades and vitiates their contentions. (*Hoke and Economides* v. *United States*, 227 U. S., 308, 321.)

Public interest in pipe lines.—We come to inquire then, What is the public's interest in the business of the appellees? It is this. By the discovery and development of

a new mode of transportation, and by securing absolute control of practically all of it, and by refusing to conduct this transportation business for the public, and using the necessity for pipe-line transportation as a compelling force, the appellees effectually control the prices of a great domestic product, thus producing not only a virtual monopoly but a complete monopoly of the oil business. We have already stated the facts which show this conclusively. It does not meet the question at issue to show that since the passage of this act, and by the enforcement of the anti-trust act, the Standard Oil Co. has been compelled to loosen its grip to some extent upon these pipe line companies. The validity of a legislative act must depend upon the [fol. 1105] conditions existing at the time the act was passed. The court may not say that the conditions which compelled this enactment have since been changed and in our judgment, therefore, the act ought not to be upheld and enforced. Even if this were possible, we might say that conditions still exist which would warrant the legislation. These pipe line companies are still supplying the same refineries with the crude oil. They still fix and maintain a monopoly price to the producer of crude oil and to the refiner who buys the crude oil of them through the control of this means of transportation. But we insist that the court must consider the conditions existing in 1906, when this act was passed, when the Standard Oil Co., as a single controlling proprietor, fixed the prices of crude oil, monopolized it, and fixed the price and controlled the refined products. Its only competitor was the Pure Oil Co. and a few small refineries. The proceeding in the *Standard Oil Case, supra,* broke, to an extent, the monopoly created by a unified ownership of the stocks of all the companies; but that dealt with only one part of the monopoly. At the other end of the line in the fields of production, a complete monopoly of the product and the price is maintained. The only method of transporting crude oil being in the hands of these so-called private operators, they refuse to transport unless the product is sold to them at their price.

The remedy.—There was but one way in which this monopoly could be broken, and that was to open the fields of [fol. 1106] production to competitive buyers; to make it possible for competing refineries to be established and maintained; these results could only be secured by separat-

ing the business of transportation from the business of buying and selling, and from the business of refining. This segregation could only be accomplished by declaring that the business of transporting oil by pipe lines should be carried on by common carriers. No other remedy could reach and cure the evil.

It is not to be supposed that the individual producer will ship his own oil to the refinery. The growers of wheat do not ship their individual products to the market; they sell to the buyers in the market, and the buyers are there because they can transport their purchases over common carrier lines to any market. They represent the mills that grind wheat into flour, the exporters who send it abroad, those who hold the grain in elevators for a profit. These buyers of wheat would not be in the fields of production were it not for the fact that the transportation lines are common carrier lines. Along these rail lines there are mills and elevators. These could not exist if the transportation lines for the carrying of wheat were monopolized and controlled by a few mills and a few elevators on the seaboard or in the middle west.

Coming back now to our first proposition, that the regulation extends to the correction of the evil; the protection of the interest which the public has in the business; it must be [fol. 1107] clear that this statute of 1906 was the remedy, and the only effective remedy that could be applied. It was therefore within the plenary power of Congress over interstate commerce to declare that the carriage of oil by means of pipe lines should be by common carriers under the act.

Connection with interstate commerce.—That this subject matter, the monopoly of crude oil, was connected with interstate commerce and within the control of Congress, can not be doubted when we consider that it was created directly through, and by means of, the agencies of transportation, and that transportation was interstate commerce.

> Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. *Northern Securities Co.* v. *United States*, 193 U. S., 197, and authorities there cited. In this connection we may refer to *Johnson* v. *Railroad*, 196 U. S., 1,

relied on in argument, which case arose under the act of Congress of March 2, 1893, 27 Stat. 531, c. 196. That act required carriers engaged in interstate commerce to equip their cars used in such commerce with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes. But the act upon its face showed that its object was to promote the safety of employes and travelers upon railroads; and this court sustained its validity upon the ground that it mani- [fol. 1108] festly had reference to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employes and travelers. It was held that there was a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object. (*Adair* v. *United States*, 208 U. S., 161, 177.)

In the *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S., 361, it was held by this court that the provisions of the interstate commerce act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. The foregoing statement is made by the court in *United States* v. *Delaware & Hudson Co.*, 213 U. S., 410-411.

In the amendment of June 29, 1906, usually referred to as the commodities clause of the Hepburn Act, it was made "unlawful for any railroad company to transport • • • any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part," etc. This act was considered by this court, and as construed was held to be "within the power [fol. 1109] of Congress to enact." (*United States* v. *Delaware & Hudson Co.*, 213 U. S., 366; *United States* v. *Lehigh Valley Railroad Co.*, 220 U. S. 357.)

The commodities clause separates the business of transportation from the ownership of the commodity shipped. While the cases are not the same, the principle involved in the three last cases cited sustains in part the doctrine con-

tended for in this case, namely, that Congress has the power to segregate the business of transportation from any other business. If this can be done, it would seem clear that it can declare that the transportation shall be carried on by common carriers where legislative reasons exist for doing so.

We respectfully submit that, under the general law announced in the foregoing cases, Congress had the power to declare that thereafter all persons or corporations engaged in the transportation of oil by pipe lines should be common carriers, for the purpose of protecting the interest of the public in a business "affected with a public interest."

II

Does the act to regulate commerce as amended in 1906, require that all persons and corporations thereafter transporting oil by pipe lines, shall be common carriers under and subject to the act?

By the amendment of June 29, 1906, the act is made to read as follows:

> That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except [fol. 1110] water, and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *who shall be considered and held to be common carriers within the meaning and purpose of this act.*

Section 6, requiring schedules of rates to be filed with the commission, was also amended, and in so far as it affects the issues in this case, it reads as follows:

> Any common carrier subject to the provisions of this act shall file with the commission created by this act * * * schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, *by pipe line*, or by water when a through route and joint rate have been established.

It is claimed by the appellees that the language used in the amendment to section 1 was not intended to apply to private pipe lines; that is, pipe lines which did not, at the time of the adoption of the amendment, hold themselves out as common carriers, or did not offer to transport oil for the public.

The statute as amended seems to be plain and unambiguous, but before discussing the language used it is proper under the rule laid down by the Supreme Court, hereafter cited, to refer to the debates in Congress for the purpose of throwing light upon the language and phrases adopted, and also to show the purposes of, or reasons for, the legislation.

[fol. 1111] These debates show (*a*) that the language adopted was intended to and does operate to restrict the transportation of oil by pipe lines to common carriers under the act, and (*b*) that the purpose of the act was to break, and in a measure destroy, a monopoly in petroleum oil.

Debates in Congress.—Pipe lines were not originally included in the "rate bill" introduced in the Fifty-ninth Congress (first session), but on May 4, 1906, shortly after the receipt by the Senate of the special message from the President transmitting a summary of the report of the Commissioner of the Bureau of Corporations on the subject of the oil industry, Senator Lodge introduced an amendment, to be inserted in the first section after the introductory words, "That the provisions of this act shall apply to." The amendment reads as follows (Congressional Record, p. 6361):

> any corporation, or any person or persons engaged in the transportation of oil or other commodity, except natural gas or water for municipal purposes, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to——

Mr. Foraker said:

> I do not want to make any opposition to the Senator's amendment, but it occurs to me that the amend-
> [fol. 1112] ment ought to be further amended, so as to provide that it shall apply only to pipe lines *operated*

for the public. I do not understand how you could compel a man who has a private pipe line of his own *to become a common carrier.* * * * I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are *carrying for the public,* and not to private lines that an individual or a single corporation may have laid down and put into operation for its own benefit * * *. [Citing an Ohio corporation, Senator Foraker further said:] They are allowed to exercise the power of eminent domain, and they are, by the terms of the statute, called "common carriers" for that reason. They are supposed to be wholly within the State of Ohio, * * * but a pipe line of that kind [private] is not contemplated to be used as a common carrier, but simply for a specific private individual purpose in the sense that it belongs only to one company (pp. 6361-2).

Mr. Tillman: I think the test is whether they are engaged in interstate commerce—whether the commodity they are transporting would come under the rule of interstate commerce—which we are allowed to regulate. That is my idea of the test of this whole question (p. 6362).

Mr. Clay: Is it not true that if the amendment is adopted the entire provisions of section 1 would apply to it and absolutely make it an article of interstate commerce?

Mr. Lodge: Absolutely.

[fol. 1113] Mr. Cuberson: That is the question I suggested. I am not sure it will, but I understand that is the purpose of the Senator from Massachusetts * * * (p. 6363).

Mr. Nelson: In reference to the amendment suggested by the Senator from Ohio to the amendment of the Senator from Massachusetts, I desire to state that if the amendment is adopted it will practically nullify the provision, because every one of these pipe lines can say "*we refuse to do business for the public.*" Practically the [original] amendment would be of no use at all. * * *

Mr. Lodge: Mr. President, *the purpose of this amendment is to bring the transportation of oil and other*

commodities within the interstate-commerce law. Oil is one of the greatest articles of interstate commerce carried in this country, and is now absolutely outside and beyond any Government regulation whatsoever. * * * But the amendment suggested by the Senator from Ohio to my amendment, to the effect that no pipe line, unless it carries for the public, shall come, under this rule, *will*, as the Senator from Minnesota [Mr. Nelson] says, *absolutely destroy the value of my amendment.*

The small well owner, to whom there have been pathetic references this morning, has not yet made his objections known to me. I heard within 24 hours after the introduction of my first amendment, on May 28, from the Standard Oil Co. A representative of that company came to see me on the following day, [fol. 1114] and represented the uselessness and injustice of this amendment. I have had a great many letters from small oil owners, and I have had a great many letters from independent refiners in support of the amendment, and the objections suggested by the Senator from Maine and the Senator from West Virginia really do not touch the case. * * *

I do not see and I have yet to hear a single valid argument why this great company [Standard Oil Co.], doing this enormous interstate business in one of the greatest articles of interstate commerce and of export and import, should alone be excluded from the supervision of the Interstate Commerce Commission.

There are twenty-eight principal pipe lines in the United States, for the most part trunk lines. There are fourteen local or gathering lines. Twelve of the principal lines are combined in one system under one control, extending from Indian Territory and from Tennessee to the Atlantic seaboard. Five other principal lines form a system under one control, extending from West Virginia and Ohio through the Pennsylvania oil fields to Philadelphia. Of the lines and trunk lines referred to, nine are known to extend across State lines, and (p. 6365) there are two about which there is some doubt, although it is probable that they do. * * * I do not think myself, from reading the definitions of those decisions, that the fact of being [fol. 1115] common carriers or exercising eminent

domain is necessary to the definition of interstate commerce.

I will read simply the leading definition before I go on, which is *County of Mobile* v. *Kimball;*

"The buying and selling, and the transportation incidental thereto, constitute commerce, and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation."

There has been legislation in regard to pipe lines in twenty-one States. * * *

I have here a list of the authorities, State and United States, simply showing that corporations engaged in the transportation of gas, oil, water, or supplied power, from a point in one State through or into another State, are engaged in interstate commerce. I will ask to have it printed with my remarks, as I have no time to go into it further. * * *

Now, Mr. President, the oil is brought to the trunk lines through small local feeding and gathering lines, as a rule. There are practically two great companies that control pipe lines engaged in interstate commerce. One is the Standard Oil, which is said, roughly, to control 90 per cent. I do not know whether that is correct or not. The other is the Pure Oil. They do not own the wells, and they buy the oil of the well owner, and the charge for the transportation is taken out of the price, as appears in the copies of the certificates and receipts which I have here.

[fol. 1116] *Those well owners are absolutely at the mercy of the pipe lines.* I have had cases brought to me, which in this fifteen-minute debate I can not enlarge upon, where an independent refinery has been deprived of its supply of oil because it would not agree to the prices of the pipe lines. *A small well owner is compelled to take the price that is offered by the controller of the trunk line.*

This is not a case of a transportation company owning the property, like a railroad owning a coal mine. It is exactly like a railroad *buying the coal of a coal miner and transporting it.* * * * The pipe line companies buy the oil they use in their own refineries and owing to the fact that they buy the oil, if you put in the words "*carry for the public,*" the pipe lines go

right out from under this amendment in my judgment. * * *

It seems to me that when we are putting under the control of the Interstate Commerce Commission transportation that is partly by rail and partly by water we ought not to omit transportation of one of the greatest and most useful commodities that enter into daily life because it is partly by pipe line and partly by rail and partly by water. * * *

No small oil well owner is going to be hurt. There is no proposition, as the letter read by the Senator from Maine (Mr. Hale) indicates, to push up the prices or push down the prices and make it impossible for a pipe line to operate. It is simply to give relief, if relief is sought, to those who find that they are not [fol. 1117] fairly treated, or think they are not fairly treated by the pipe lines, through which alone, practically, they can get their commodity to market (p. 6366).

May 15 the bill was again before the Senate. The clause had been amended to read:

Any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, at any place within the jurisdiction or within the governmental authority of the United States who shall be considered and held to be common carriers within the meaning and purpose of this act, and to—

Mr. Hopkins called attention to the fact that the words commencing with "governmental authority" were an amendment proposed by Senator Morgan, and called attention to the fact that this would cover the Philippines, Porto Rico, Isthmus of Panama, and Hawaiian Islands (p. 6896). In a message by President Taft, upon this feature the provisions in the Lodge amendment are referred to. He says:

The wisdom of a provision *of law declaring that a pipe line in this country shall be made a common carrier between States* is wholly aside from the point, for it is not at all analogous to the one I am discussing.

The pipe lines constructed in the States are pipe lines under permanent franchises, *much more likely to invite* in this country *the monopoly* than a mere revocable [fol. 1118] license. The conditions on the Isthmus are, of course, entirely unsettled; * * * if it becomes wise to require that these pipe lines [in the Philippines] be made common carriers in the future, the President may effect this result *under the revocable license by withdrawing the license unless the change is made, or it may be done by act of Congress,* but, with deference, I think it ought for the present to be left to the President's discretion to say when the occasion has arisen for the change (p. 6896).

Mr. Morgan. Then I take it for granted the Senator from Illinois (Mr. Hopkins) *wants to reverse the action* taken by the Senate *in regard to making pipe lines common carriers* and is opposed to the entire project. He does not want the Government of the United States to *declare that pipe lines are common carriers* and that they are subject to regulation as to rates by the Interstate Commerce Commission. Is that the situation? (p. 6896).

May 17, the rate bill being under consideration, Mr. Nelson said:

The Standard Oil Company has a large pipe line running through the country. That pipe line has many feeders. Private parties built pipe lines to the trunk line to run the oil from their own wells which are connected with the pipe lines of the Standard Oil Company, which company buys from these various small dealers. The different parties who have these feeding lines from their wells ship their oil to the trunk line. Their relation to the public is exactly the same as the [fol. 1119] Elevator Company to which I have referred in Minnesota. We have as much right to control such pipe lines as the public have a right to control that grain elevator at Lanesboro in Minnesota. The Standard Oil Company purchases oil from the independently shipping oil owners, who have built little feeding lines connecting with the trunk lines of the Standard Oil Company. It *purchases their oil and holds a monopoly of the use of the main line;* and unless it is put under

> the control of the Interstate Commerce Commission it can carry on its business with impunity, *and practically destroy all the independent dealers and the independent lines* (p. 7001).

Mr. Teller, who took an adverse position, contended against the language of the Lodge amendment on the ground *that it interfered with private ownership,* recognizing that the purpose and intent of the amendment was to cover all lines doing interstate business (p. 7008).

Mr. Clay, discussing the commodity clause, said:

> A private company, engaged in transporting its own oil or gas through pipe lines constructed at its own expense, should not be deprived of the privilege of transporting its own oil or gas. These lines are used for no other purpose, and if they can not be used for this purpose then they must be abandoned. The rule must be, then, for railroads, because they exercise the right of eminent domain and were chartered to do business for the public.

His position being that the *effect of the language* of the Lodge amendment would be to make them common carriers [fol. 1120] and deprive private lines of their right to carry their own oil (p. 7009).

Mr. Stone said:

> I have not believed, Mr. President, that the pipe lines constructed by a company or an individual for use solely in his or its own business, or for transmission of his or its own product and used for that alone, would be subject to the *provisions of this proposed law.* But the first section of this bill *does provide that all pipe-line companies engaged in carrying oil* or other commodities from one State or District to another *shall be considered common carriers* (p. 7016).

Mr. Bacon undertook to give a different meaning to the words of the amendment so as to make it apply only to pipe lines that were common carriers, using the same construction contended for in this case (p. 7016).

The bill being again under consideration in the Senate on June 25, Mr. Tillman said:

> We had gladly consented to the change in the first conference *placing pipe lines unequivocally and in*

the plainest possible language in the list of common carriers, but with this change of phraseology Senators will see the possibility of numberless lawsuits.

Mr. Tillman was discussing the commodity clause and the change substituting the word "railroad" for "common carrier" and he further said:

> Again, I want to get back to the change of "common carrier" to "railroad." As I said, instead of the [fol. 1121] producing of oil along with the producing of coal being divorced from the transportation of oil and the transportation of coal as the Senate intended, the provision simply limits the divorce to railroads, and by changing "common carrier" to "railroad" you let the Standard Oil Company loose absolutely from this provision [commodity clause], and we encourage and perpetuate that grinding monopoly (p. 9103).

Mr. Lodge said:

> I believe to *make them common carriers in the language of the act* would bring the great trunk lines within the operation of the act, and, I think, will do it sufficiently so far as carrying oil to market. Of course, what all oil producers desire to reach, is a line which will carry their oil to the great distributing centers and especially to the seaboard. I think under this clause as it now stands these trunk lines which are practically 90 per cent in the control of the Standard Oil *may be compelled to take the oil of other producers.*
>
> When the commodity amendment was added they became then, *as we have defined them to be, common carriers.* They then would have been unable, if engaged in interstate commerce, of course, to own oil wells or to own oil. They would have done simply a carrying business. It was changed to "railroad" in that clause *in order to relieve the independent company* [from the commodity clause].
>
> My own belief is that what is relieved is the Standard Oil. The commodity amendment was not my amendment, but *was added after the amendment I of-* [fol. 1122] *fered had been agreed to.* * * * I can see no possible reason why the men controlling these great trunk lines of pipes should not make it *a carry-*

ing business and be content to *carry oil for all producers at a reasonable rate.* We make the railroad do it, and I do not see the slightest reason for this change. But there is no doubt that the effect of the change [commodity clause] is to take the pipe lines out of that section and leave it to apply only to the railroads (p. 9104).

Senator Elkins presents as a part of his argument the West Virginia statute making pipe lines common carriers (p. 9250).

The bill being under discussion June 26, Mr. Long said:

This bill makes all pipe lines common carriers without any exception.

Mr. Mallory. *Yes; this bill says that,* but this bill can not make a common carrier out of a line that is not a common carrier.

Mr. Long. *That will be for the courts to determine* (p. 9254).

Mr. Foraker. A majority of the Senate insisted that this provision should apply, as the Senator from Massachusetts contended it should, to all pipe lines, *without regard to whether they were carrying for the public or not,* his contention being that such a qualification would destroy the effect of what he was trying to accomplish (p. 9255).

Mr. Long. But *the intention of this amendment,* as the Senator will admit, *is to take in all pipe lines. There are no exceptions,* and it will take a decision of [fol. 1123] the courts to determine whether the Senator and myself are right in that proposition (p. 9256).

Mr. Long. If Congress has the power to make a common carrier out of a pipe line that is owned by a corporation which is using it to transport its own product, *and this is so in this law,* it should except pipe lines in the commodity section *and not prevent the owner of a pipe line that crosses a State line from transporting his own oil in his own pipe line* (p. 9257).

Mr. Long was here discussing the Prairie Oil & Gas Co. (p. 9256).

Mr. Richardson. We have declared them in this bill to be common carriers, and unless we had "railroad

companies" for "common carriers" in the fifth amendment *we would have prohibited these pipe lines from carrying their own oil* (p. 9581).

Mr. Elkins, referring to telegrams and petitions, said:

> The signers of these telegrams expressly say that they have no objections *to making pipe lines common carriers,* but they protest against not being permitted to transport their own product (p. 9647).

The Lodge amendment being before the House of Representatives on June 26, 1906, Mr. Rhinock brought before the House facts and claims regarding the different pipe lines, and stated the purpose of the law as he understood it. He informed the House fully with reference to the objections made by so-called private lines, and presented [fol. 1124] arguments in favor of covering all trunk lines with a provision *making them public carriers.* He based his line of argument, in favor of the constitutionality of the bill, upon two grounds, (1) that they exercised the right of eminent domain and (2) that they constituted a public market and therefore were subject to control. He does not discuss the question upon the broad fundamental principle that Congress has plenary power over all interstate commerce and can declare by what agencies it may be carried on. But the discussion by Mr. Rhinock is important as showing the understanding of the controversy in the House as to the scope of the Lodge amendment.

Mr. Rhinock refers to a House bill, introduced by him (H. R. 15438), entitled "A bill to declare certain persons, firms, associations, and corporations to be common carriers and subject them to the provisions of the interstate commerce act," and said:

> *I want pipe lines to be common carriers* under the law, and whether that end shall be reached under the separate bill introduced by me last February *or by the adoption of the Lodge amendment to the Senate bill is immaterial.* * * * It has been suggested that pipe lines for oil are private lines, private property, and that this legislation will affect them injuriously. * * * The contention is that all of the pipe lines now doing business throughout the country are public and not mere private lines. It is true that they claim that

they only transport their own oil—that they carry only their own goods.

[fol. 1125] He then proceeds to discuss the question upon the two propositions above named—exercise of eminent domain and that through the practice of buying oil at the wells they create public markets; cites the Lanesboro Elevator case (Minnesota), opinion by the Supreme Court of the United States. (180 U. S. 452.) He further said:

> The Standard Oil Company, owning 90 per cent of all the pipe lines of the country, has a large pipe line running through the country which is fed all along its length by a host of feeders. Private parties built pipe lines to the trunk line to run the oil from their own wells, which are connected with the pipe lines of the Standard Oil Company, which buys the oil from these smaller dealers. The different parties who have these feeding lines from their wells ship the oil to the trunk lines and stand in the same relation to the public that the Elevator Company does in Minnesota. The United States has as much right to control these pipe lines as the State of Minnesota has to control private elevator companies.
>
> The Standard Oil Company needs this regulation most. It purchases the oil from the independently shipping oil owners who built the feeding lines to the great trunk line of the Standard Oil Company. It purchases their oil and refuses to pipe it beyond the point of intersection with the oil owners to a possibly better market beyond. *It monopolizes the trunk line carriage, and is subject to control on the ground that it buys oil from the owner, measuring and grading it in their own way, and therefore occupies the position of* [fol. 1126] a public market subject to public control.
>
> The pipe lines ought to be brought under the control of the Interstate Commerce Commission (p. 9337). Its enormous trunk line—the largest in the world—makes it peculiarly appropriate that it should be brought under this control. * * *
>
> And I am opposed to any change in the verbiage of the bill which shall attempt to except such pipe lines from the operation of the law "which do not transport for hire" or "transport for the public." While the

Standard Oil Company does the greatest business, it is not therefore necessary for us to legislate against them alone.

The law must be general, and all pipe lines must be treated alike. * * *

Conclusions to be drawn from these debates.—One can not read these debates without reaching the conclusion, beyond the peradventure of a doubt, that the Senate and the House, when the amendment of 1906 was finally adopted, understood that the language of the Lodge amendment meant to and did declare that all persons or corporations thereafter operating pipe lines for the interstate transportation of oil should be, and should be held to be, common carriers; that Congress had before it (1) the system of pipe lines owned, operated, and controlled by the Standard Oil Company, and (2) the pipe lines owned, operated, or controlled by the Pure Oil Company, and that the purpose of that legislation was to bring these, with all other lines, [fol. 1127] under the regulating power of the Interstate Commerce Commission, thereby breaking the existing monopoly. The pipe lines owned, operated, and controlled by the Standard Oil Company at that time are set forth in the decree of the Circuit Court of the United States herein referred to, a copy of which is Exhibit A to the answers of the Interstate Commerce Commission (Rec. No. 482, p. 71). The lines connected with the Pure Oil Company are the United States Oil Company and the Producers and Refiners Oil Company.

The monopoly under consideration by Congress, and aimed at by this legislation, was created by the methods and practices of operating pipe lines, in connection with the great refineries, buying crude oil at the wells in the fields of crude-oil production, and refusing to carry oil through the pipe lines upon any other condition than that the producer should sell his product to the pipe-line company or the refineries at arbitrary prices fixed and posted at the wells by the pipe-line companies. It was connected with, and resulted directly from, the method of transportation. Only as a private business could these prices be controlled and competition excluded.

Rules of construction.—The general purpose and aim in construing a statute is to ascertain its true meaning and

its true application to concrete cases. For this purpose resort may be had—

1. To the language and arrangement of the statute.

2. The intention and object to be secured by the legislation.

[fol. 1128] 3. Matters and circumstances attending its passage.

4. Sense in which it was understood by the legislators and contemporaries.

5. Its relation to the law into which it is incorporated as an amendment.

6. As amended, the statute must be considered as a whole.

(Cyclopedia of Law and Procedure, vol. 36, pp. 1102, 1136, 1138 et seq.)

Aids to construction.—The statute, considered as a whole, furnishes the best guide for its construction, and the ascertainment of the sense in which the words of an amendment were used.

But if, after considering the language of the entire statute, there remains a doubt as to its meaning, the court may consider extrinsic matters, such as the circumstances existing at the time of its enactment. (*Standard Oil Co.* v. *United States,* 221 U. S. 1, 50.)

Other legislation on the same subject may be considered, and the results that would follow a different construction.

> Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions in it. (*United States* v. *U. P. R. R. Co.,* 91 U. S. 79.)

The purpose of the act.—The purpose of the amendment to the act in 1906 is clearly shown by the debates in Congress, to have been to bring the systems of pipe lines, [fol. 1129] carrying the crude oil of this country, under the act to regulate commerce and to require them to be common carriers if they continued the business of transportation. The reason for this regulation was a desire to break the monopoly and to give the producers of crude oil open markets. It was not expected that the producers would

make individual shipments of oil, any more than the producers of wheat ship their wheat to the great markets. The farmer sells his wheat to the general buyer; the general buyer having an open way to the great markets over common-carrier lines of railroad and boats, it results that there are many buyers in the markets. The farmers get the benefits of competition, not by shipping their own wheat, but by marketing it where there are many buyers. It had come to pass that only the great refineries, who could own, or operate, or control the pipe lines, were the buyers of crude oil in the fields of production. If a person with capital desired to erect a refinery, and thus extend the business and the competition, he must build a pipe line for his refinery. If competing refineries existed, individual buyers could not go into the fields of production and buy the oil, because they could not ship it to any refinery except one controlling a pipe line and these refineries were supplying themselves through their own pipe lines *at arbitrary prices fixed by themselves.* The purpose of the legislation, therefore, was to open the fields to competition, that there might be buyers of oil, as there are buyers of grain, in the fields of production; that there might be an inducement for capital [fol. 1130] to go into the business of refining, with equal rights over the lines of transportation. To accomplish these ends, and others that might be named, Congress sought to and did declare that the interstate transportation of oil should be by common carriers only. It did not apply the commodity clause to oil as it did to coal. The existing refineries, therefore, can ship their supplies of oil, but in the future must buy in open markets in competition with any other buyers or refineries that seek the oil. It is only the monopoly that is destroyed. These pipe lines will still continue to carry all the oil that the refineries can use and all the oil that any additional refineries may require; they will meet the increased demand for transportation by increased facilities, as the railroads have done, provided they are limited to the business of transportation.

To destroy a monopoly, created by transportation methods, is a proper object of legislation under the commerce clause.—In *Pearsoll* v. *Great Northern Railway Company*, 161 U. S., 646, 676:

> Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether

such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is, and has been, for the past 300 years, both in [fol. 1131] England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

In *U. S. v. Knight*, 156 U. S., 112, Mr. Chief Justice Fuller, speaking for the court, said:

> The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. *But it may operate in repression of monopoly whenever that accrues within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.*

The whole country was aroused by this monopoly of a national product, valued at nearly $150,000,000 per annum. A special inquiry had been instituted by the Department of Commerce and Labor, under a resolution by Congress, into the industry, and this enactment was the result of a widespread public conviction, supported by the report of the department, that the monopoly was deep-seated and perilous—a menace to the public welfare.

[fol. 1132] *The language of the statute.*—Bearing in mind, then, the objects, so clearly stated in the debates, let us analyze the separate declarations in this amendment to the law.

The act to regulate commerce was enacted to control or regulate common carriers; all rail carriers, and such others as might be brought under it. Every person or corporation

subject to regulation under this act, or was to become, a common carrier, otherwise the act would be inappropriate. The amendment follows the declaration in the original act, that "the provisions of this act shall apply to," and reads, any corporation, person, or persons "*engaged in the transportation of oil by pipe lines.*" This declaration has no condition or words of limitation; it applies to a commerce, "the transportation of oil by pipe lines." All corporations or persons engaged in the interstate transportation of oil by pipe lines are included. The amendment again declares that these corporations and persons, the agents of this transportation, "shall be considered and held to be common carriers within the meaning and purpose" of the act. "*They shall be considered*" is plain, unambiguous language, and is susceptible of only one meaning when used in a public statute. It governs the action of all legislative, executive, and judicial officers having to do with the statute, or the business, and declares that these officers and departments of government shall *consider* these corporations and persons so engaged *to be common carriers.* Not only that, [fol. 1133] but another word is inserted, they shall be "*held*" to be common carriers. This is to make the declaration plain to the judicial department of government when called upon to interpret this statute and enforce it. They shall be *held* to be common carriers under the act.

The language could not be plainer or less unambiguous.

It may be observed also that Congress subsequently, in amending this act, June 18, 1910, brought under the statute "telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages" interstate, by inserting the designation of these companies into this amendment, preceding the words which we have been discussing "who shall be considered and held to be common carriers." These telegraph and telephone companies were private companies; they had no power of eminent domain, and yet, if they are under the act and subject to it, as undoubtedly they are, they are made so by the very language which was made applicable to all pipe-line companies.

Therefore, considering the language used, its relation to the statute, the debates in Congress, the purposes for which it was passed, the plain reading of the words and the effect to be given the whole act, the statute clearly declares that all pipe-line companies, whether corporations or persons, who may voluntarily transport oil by pipe lines, shall

be common carriers under and subject to the act to regulate commerce.

[fol. 1134] III

If the act as amended does require that all corporations and persons thereafter engaged in the interstate transportation of oil by means of pipe lines shall be common carriers, is the act constitutional?

To answer this question requires a consideration of the comprehensive powers of Congress over interstate commerce, the restriction upon such power in the fifth amendment to the Constitution, and a careful analysis of the act under consideration and its effect upon the business of the appellees.

Power of Congress over interstate commerce.—The power of Congress is fixed by two clauses in the Federal Constitution, article 1, section 8, paragraphs 3 and 18. Summarized for this case, *Congress has power to "regulate" interstate and foreign commerce and make all laws necessary and proper to carry into effect the power to regulate.*

Mr. Chief Justice Marshall, in *Gibbon* v. *Ogden*, 9 Wheaton, 1, 196, stated this power as follows:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

This definition has been accepted by this honorable court without deviation since it was uttered. It has been elaborated and applied to many varying cases; and it may be said that in all cases the power of Congress over interstate [fol. 1135] and foreign commerce has been declared to be plenary, with all the incidents of sovereignty that attend the manifestation and exercise and application of this power. In the *Lottery Case* this court, speaking through Mr. Justice Harlan, defined it as follows:

> * * * They also show that the power to regulate commerce among the several States is vested in Congress *as absolutely as it would be in a single government*, having in its constitution the same restrictions

on the exercise of the power as are found in the Constitution of the United States; that such power is *plenary, complete in itself,* and may be exerted by Congress *to its utmost extent* subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and *that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because,* in their opinion, such regulations may not be the best or most effective that could be employed. (188 U. S., p. 353.)

In the exercise of this power over interstate and foreign commerce the field of its exercise is coextensive and the subjects as innumerable as in the domain of the police power by the States. (White Slave Cases, 227 U. S., *supra.*)

Power to prohibit.—The power to regulate includes the power to *prohibit* particular interstate and foreign commerce. This question arose in the first case arising after the adoption of the Constitution, and engaged wide-spread attention in the United States. Congress, on December 22, [fol. 1136] 1807, passed an act entitled, "An act laying an embargo on all ships and vessels in ports and harbors of the United States," and a supplemental act was passed January 9, 1808. Privately owned and operated ships were carrying foreign commerce from ports of the United States to ships at anchor and to foreign ports. This act prohibited their business. The case was heard in the District Court of the United States for Massachusetts, and the opinion written by Davis, district judge. It was conceded that the act was not a war measure and was passed in the interests of commerce and peace. This was the legislative reason for the act. The act was sustained as being within the power of Congress, and the following excerpts from the opinion are here given:

* * * Stress has been laid in the argument on the word regulate as implying in itself a limitation. Power to regulate, it is said, can not be understood to give a power to annihilate. To this it may be replied that the acts under consideration, though of very ample extent do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree

or extent of the prohibition be adjusted but by the discretion of the National Government, to whom the subject appears to be committed? * * *

Further, the power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself or tending to its advancement, [fol. 1137] but in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; *but the national right or power under the Constitution to adapt regulations of commerce to other purposes than the mere advancement of commerce appears to me unquestionable.* (*United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255.)

In *Gibbon* v. *Ogden, supra,* Mr. Chief Justice Marshall refers to these acts and concedes the power of Congress therein exercised. He said:

But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo, which for a time engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed in a part of our country which supposed its interests to be vitally affected by the act can not be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be im- [fol. 1138] puted to those who were arrayed in opposition to this. * * * They denied that the particular law in question was made in pursuance of the Constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce.

The right to prohibit particular commerce has since been sustained by this court, where the prohibition has been exercised for the public welfare, notably in the meat-inspection and food-and-drugs acts, the lottery act, the commodity-clause act, and the white-slave act. This court sustained this power to prohibit, by its construction of the interstate-commerce act forbidding discrimination, and enforced it against the carrier, thereby rendering it impossible for the carrier to deal in the commodities which it carried. In reference to this practice, the court said:

> It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an [fol. 1139] advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof, and the sole seller at the place where the products were to be marketed; in other words, to create an absolute*ly* monopoly. (*New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S., 361, 392.)

Thus we see that in the exercise of the power of regulation Congress may expressly, or by general prohibitions which the court will construe and apply in particular cases, prohibit absolutely a particular kind of transportation, which without such prohibition would be perfectly lawful.

Fifth amendment to the Constitution.—The only prohibition upon the exercise of this broad power of regulation is that contained in the fifth amendment, prohibiting the taking of property without compensation and without due

process of law. This provision is so familiar it need not be quoted.

As the prohibition in the statute under consideration is based upon the right to prohibit monopoly, we need not spend much time in citing authorities upon this branch of the case. If the Lodge amendment had for its purpose the destruction of a monopoly created by the transportation of oil by means of pipe lines by private persons or corpora- [fol. 1140] tions, and it has that effect only, the destruction of the monopoly is not a taking of property prohibited by the fifth amendment. It is an exercise of what is commonly denominated the police power, and any loss must fall upon the owner. (*North. Trans. Co.* v. *Chicago*, 99 U. S., 635; *Lottery Case, supra; N. Y. & N. H. Ry. Case, supra; Union Bridge Co.* v. *U. S.*, 204 U. S., 364; *Commodities Clause Case, supra; South. Ry. Co.* v. *U. S.*, 222 U. S., 26.)

Effect of the act upon the business of the appellee.—The business of transportation as a part of "commerce" is a distinct business. If a corporation is being organized to carry on a transportation business, it must be stated as one of the objects for which the corporation is organized. This was recognized by the Standard Oil Company in amending its charter in 1879. It is an object stated in the articles of incorporation and the articles of association of the appellees in this case. It was so recognized in the New Haven case and in the commodity-clause act and the decisions thereunder. True, without statutory prohibition corporations may include this transportation business with other businesses, but this does not diminish the force of the statement that the business of transportation is separate and distinct from all other occupations.

Three appellees are carriers, buyers, and sellers.—Three of the appellees are incorporated and engaged in the business of carriers of oil by pipe lines and the business of buying and selling oil. They do not consume or refine crude oil. Any effect of the act which affects refineries, therefore, [fol. 1141] does not affect these three appellees. They are practically and for all the purposes of this case in precisely the same position as to crude oil that the railroads were as to coal in the New Haven case. They buy and sell and they transport the commodity. Each "concentrates" in its own hands the products which were held for shipment and selects "the favored persons to whom he would sell," thus

enabling the carrier, in connection with the purchasers, "to create an absolute monopoly."

The effect of the act upon these three appellees is to prohibit the private carrying of oil by means of pipe lines, and to require them, if they voluntarily continue this occupation, to transport as common carriers. The act prohibits particular transportation—private transportation by pipe lines—but it throws open to the widest extent the transportation by pipe lines by common carriers. This does not destroy or impair the business of transporting oil by this means. In fact, these petitioners allege that it will increase their business and require additional facilities. The act does not prohibit their charging and collecting reasonable rates for such transportation service; it therefore does not require a service for the public without compensation. Nor does the act compel these appellees to be common carriers. As stated in the *Munn case:*

> He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.

[fol. 1142] It is insisted, and so held by the Commerce Court that the act *in effect* compels them to be common carriers, as it can not be supposed that they will withdraw from the business. That is not the edict of Congress. It is a compelling, economic force, and good sense that will lead these appellees to continue a very prosperous and profitable business.

The conclusion is inevitable that the only effect of this regulation by Congress is to destroy the monopoly occasioned directly by the private carriage of crude oil by pipe lines, and that in every other respect the traffic and the business are free and unaffected. It can not, therefore, be said that this is a taking of property within the meaning of the fifth amendment. It is a true and proper regulation of this transportation business by these means, which have come into being in the last few years and absolutely dominate the oil industry.

Three are carriers and refiners.—The three other appellees are engaged in the transportation of oil as carriers and in the business of refining crude oil. By the private carriage of the crude oil through their pipe lines and the purchase of it at the wells, either by their own pipe lines or

connecting pipe lines, they have created and are maintaining a monopoly. The keen eye and shrewdness of the monopolist is not better illustrated or exemplified in the history of trade and commerce than it is in the move by which the Standard Oil Company acquired its present pipe lines. As we have seen, up to 1906 these pipe lines were owned and [fol. 1143] operated by corporations which, under the act of incorporation and the laws of each State under which they are severally incorporated, required them to be common carriers. The fact that they had gone outside the State in building pieces of their lines did not change the character of the agent. It was still a common carrier by law. The States had not rigidly enforced, and could not be expected to enforce extra-territorially, the provisions of the law making the National Transit Company and the New York Transit Company common carriers. The National Government was about to take action and require common carriers to file their tariffs and authorize its commission to pass upon the reasonableness of the rates; in other words, to compel obedience to the law. The Standard Oil Company owned the two transit companies absolutely, and it immediately proceeded, through its controlled directorates, to cut off the feet of these common carriers in order to prevent the carriers being of any practical service to the public. They stopped the common-carrier lines at Unionville, Centerbridge, and Fawn Grove, places in the open fields, with no rail connections; nothing at either place to induce the building of a refinery or the location of any sort of a consumer of crude oil. By that procedure and the operation of these ends of the lines to the seaboard they undertook to prevent the common-carrier agent from making through rates—the reasonableness of which could be passed upon by the Federal Government—from the Appalachian field to the [fol. 1144] seaboard. Another purpose was to prevent the erection of independent and competing refineries upon the seaboard, which otherwise could be served by these common carriers.

The purpose in the mind of the Standard Oil Company is the purpose in the mind of all the other appellees who are refiners, namely, to monopolize the one single efficient method of transporting crude oil. To control the common-carrier lines they extend their own facilities far enough either to a field or to a connection with another pipe line to monopolize the oil business through their lines and thereby

prevent the establishment of competing refineries. What has been said with reference to the effect upon the other three appellees is equally true of the effect upon these three appellees. They may "withdraw" from the business, but, if they voluntarily elect to continue as common carriers, their pipe lines will be filled with traffic and they will be entitled to collect reasonable rates for the service. The only loss to them will be the monopoly occasioned by through private transportation. The only destruction occasioned by the act is the destruction of their monopoly.

Pipe lines carry all the traffic.—The pipe lines are carrying to-day the entire output of crude oil east of the Rocky Mountains. Under the act they will not carry less, because transportation by pipe line is so much cheaper than transportation by any other method that this instrumentality will continue to have a monopoly of the traffic. The companies [fol. 1145] operating these pipe lines, under the protection of the Federal law, will receive reasonable rates as compensation for the transportation service. There is, therefore, no destruction or impairment of property rights protected by the fifth amendment.

Weems case.—The case of *Weems Steamboat Co.* v. *Peoples Co.*, 214 U. S., 345, is the authority upon which the Commerce Court decided these cases. That was a suit between water carriers and did not involve in any sense, or to any degree whatever, a State or Federal enactment. In the *New York, New Haven case*, as we have seen, the question was the violation of the Federal law prohibiting discrimination. In *The Lottery case, Commodities Clause case*, and the *White-Slave act* the court was called upon to give effect to legislative acts. The distinction between such cases and the case of private litigation between private individuals or corporations is as wide as the poles, and the latter has no authoritative force or effect in determining the former. The one deals with purely private rights without any violation of express public law, and the other deals with the force and power of sovereignty; and legislation respecting the particular matter.

We respectfully submit, therefore, that this case has no determining effect in these cases.

The Commodity Clause case.—The act in that case, as construed by this court—

> forbade a railway company from transporting in interstate commerce articles or commodities (1) which

[fol. 1146] it has manufactured, mined, or produced; (2) which had been so mined, manufactured, or produced under its authority; (3) which it owns in whole or in part; and (4) in which it has an interest, direct or indirect.

U. S. v. *Lehigh Valley R. R. Co.*, 220 U. S., 257, 265.

The court held that the first two prohibitions, if literally construed, had no time limitation, and therefore any coal produced by or under the authority of the railroad company could not be shipped *at any time*. It was a total prohibition upon this traffic. No reason could be assigned for such a prohibition; there was nothing in the commodity or traffic that was objectionable. The court found that the purpose of that act was to *dissociate the business of transportation from the business of producing and buying and selling coal*. The *public welfare* called for the use of the coal, and therefore its shipment. If the coal was sold and disposed of by the railroad company before shipment, it would place the first two prohibitions upon the same basis as the last two prohibitions, namely, that no railroad company could ship coal which it had produced *and owned* at the time of shipment or which it had purchased and owned at the time of shipment. The grave constitutional question involved in the case was not whether great property losses prevented Congress from exercising its power to regulate commerce, but whether the total prohibition of a traffic absolutely devoid of any inherent evil or objection could be arbitrarily or [fol. 1147] capriciously forbidden by Congress where great property interests would be affected.

Legislative reason.—The whole line of decisions, from the *Brigantine William*, to the present time, recognized that there must be a proper balance between the power of Congress and the constitutional protection of property against arbitrary power. There must be *some reason* to support an act seriously affecting property rights apparent upon the face of the legislation. In the case of the embargo in 1808 the plain purpose of the act was to protect our commerce and aid in maintaining peaceful foreign relations. In the cases involving quarantine service the reason for such a prohibition was to prevent the spread of disease affecting health and property interests. In the *Lottery case* the prohibition was based upon a change of public sentiment regarding the morality of the business. All these questions of public

welfare are matters *within the consideration and discretion of the legislative branch* of the Government. In determining whether an act or prohibition is valid the court will inquire whether a reasonable cause for the legislation existed, but may not determine the extent or force of it as a cause operating upon the legislative will. Judge Davis stated it as follows:

> • • • Legal discretion is limited. It is thus defined by Lord Coke, *Discretio est discernere, per legem, quid sit justum.* Political discretion has a wider range. It embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that can affect [fol. 1148] the national interests. Legal discretion has not the means of ascertaining the grounds on which political discretion may have proceeded. It seems admitted that necessity might justify the acts in question. But how shall legal discussion determine that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting nations, has not perceived such necessity to exist? Considerations of this nature have induced a doubt of the competency or constitutional authority of the court to decide an act invalid in a case of this description.

As the two prohibitions in the commodity clause were not, if literally construed, sustained by any reasonable cause for their enactment, and such construction would result in absolutely destroying the coal so produced by preventing its transportation to market, the court adopted another construction, which it regarded as consistent with the two remaining prohibitions, *and gave effect to the statute.*

It will be observed, and it is very important in applying the case to the one at bar, that the railroad companies were prohibited from carrying on in the future a *legitimate business authorized by their charters*—transporting coal owned by them—and were thereby deprived of a clear property right, and it was held that the regulation was a constitutional exercise of the regulating power of Congress over that commerce. The movement of the coal was interstate. It was, therefore, a subject exclusively within the [fol. 1149] jurisdiction of Congress, and in making a regulation concerning the carriage of such commerce Congress could determine, and did determine, that it should not be

carried by the owner—that the agent of that commerce should be dissociated from the ownership—the reason for the regulation being that the combination of the business of mining, buying, and selling with transportation, tended to create undue discrimination against other shippers of coal. The fact that the deprivation of property rights in that case were great and grave did not prevent the court from holding, as it has always held, that the statute in this particular was constitutional. The court said:

> The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think, is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in the *New Haven case*, to which we have previously referred. We do not say this upon the assumption that by the grant of power to regulate commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities or to destroy the governmental power of the States as to subjects [fol. 1150] within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preexisting rights of the railroad companies were subordinated. (*Armour Packing Co.* v. *United States*, 209 U. S. 56.)

We think it unnecessary to consider at length the contentions based upon the due-process clause of the fifth amendment. In form of statement those contentions apparently rest *upon the ruinous consequences* which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may

be conceded, as insisted on behalf of the United States, that *these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation.* * * *

U. S. v. *D. & H. R. Co.*, 213, U. S., 266, 415, 416.

This case is conclusive authority for our contentions in the case at bar. In designating the commerce to be regulated by the Lodge amendment, there is no limitation. It [fol. 1151] covers "*the transportation of oil* * * * *by means of pipe lines.*" It applies to *all transportation by pipe lines; that is, all movement of oil for commercial purposes through pipe lines and over State lines.* There is no limitation as to the persons or corporations that may be engaged as agents of such commerce. The statute plainly says: "That the provisions of this act shall apply to *any* corporation or *any* person or persons" so engaged, and here the court may not import into the statute any words of limitation. Congress has written in plain and unequivocal language that the regulation shall apply to *any* corporation or person and to *all* movement of oil through pipe lines. The act nowhere attempts to prohibit the transportation of oil. Oil owned by the agents of transportation may be carried. The only prohibition is that the transportation *by pipe lines* shall be carried on by common carriers under the act. This prohibition is in no sense greater or broader or more destructive of private business than was the commodity clause as construed and sustained by this court. Under that act the carrier can not transport coal owned by it at the time of transportation; in this act a private person or corporation can not transport oil *by pipe lines.* In the former case the moving cause of the legislation was to prevent undue discrimination and preferences among shippers; in the present case the moving cause of the legislation was to prevent a monopoly in crude oil. This restriction is applied only to *pipe lines;* all other instrumentalities are unaffected. [fol. 1152] The reason for the legislation is a proper one; it is as broad and as important a reason for regulation as is the prevention of discrimination and preferences. In fact, both reasons rest upon the same basic principle. Whether the popular prejudice against this monopoly in oil is well grounded the court may not inquire; that it was at the time of this legislation general and widespread no one

will deny, and the words of the Supreme Court in *Pearsall v. Great Northern Railway Company, supra,* heretofore quoted, are appropriate:

> We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language.

Summary

In the final analysis this controversy may be summed up in the following proposition: Congress has power in regulating the interstate movement of oil through pipe lines to declare that it shall be moved only by common carriers under the act; the reason for such regulation is that the movement by private carriers tends to the creation of a monopoly in the commodity; therefore, as said by this court, "the conception that inconvenience, not power, is the [fol. 1153] criterion by which to test the constitutionality of the legislation" is "mistaken and baleful."

The decree of the Commerce Court should be reversed and the petitions dismissed.

Respectfully submitted, Charles W. Needham, Assistant Solicitor.

[fol. 1154] EXHIBIT "E"

To the Petition for Rehearing

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

No. 2721. Civil Action

INTERSTATE COMMERCE COMMISSION

vs.

TANK CAR OIL CORPORATION

This is a suit by the Interstate Commerce Commission as plaintiff, proceeding under the authority of the provisions of part 2 of the Interstate Commerce Act and section 322b

thereof (49 U. S. C. A. 322b), seeking to enjoin the defendant from operation as a distributor of gasoline without having obtained a certificate authorizing such operations as a motor carrier. A hearing has been had at which testimony was adduced, and the parties have argued the case by brief. The facts are found as follows:

Findings of Fact

The defendant is a corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business in Atlanta, Georgia. Defendant owns and operates twelve retail gasoline filling stations in and near Atlanta, Georgia, and controls four such retail stations in which it furnishes pumps, tanks and other equipment under an agreement whereby these stations agree to purchase their gasoline from the defendant. The defendant operates several tank trucks and tractor-tank transports, by means of which it purchases both within and without the State of Georgia and transports such gasoline as is necessary to keep its stations supplied with stock sufficient for its retail sales. This gasoline is purchased largely in Bir- [fol. 1155] mingham, Alabama, St. Marks and St. Joe, Florida, and at Chattahoochee, a distributing terminal of the Southeastern Pipe Line Company near Atlanta, Georgia. When and if defendant is able to purchase more gasoline than is required for the operation of the retail stations, he makes sales of tank truck lots at wholesale to other dealers in the State of Georgia. In the period between June 12, 1943 and the time when the complaint was filed, December 20, 1943, this being when it is alleged the defendant illegally transported in Interstate Commerce gasoline for compensation, the defendant bought 343 truck loads of gasoline. It used 168 truck loads in its own retail stations, and sold 165 truck loads at wholesale to its controlled stations and other customers.

The complaint alleges eleven claimed illegal acts of transportation, and which are contended by the defendant were actual wholesale sales of gasoline. Proof was introduced of a statement by the managing officer of the defendant made to a representative of the plaintiff, and of testimony of two of the purchasers of the gasoline included within the eleven specified transactions.

During the period under investigation, an acute shortage of gasoline existed because of war conditions and the infer-

ence is clear that no dealer had on hand at all times sufficient stock to supply all demands.

The price at which the defendant made his sales to customers varied in proportion to the distance of delivery, but the defendant's testimony that the sales were made to meet [fol. 1156] competitive conditions is not contradicted. The difference between the price paid by the defendant at the terminal at Birmingham, and the price received from his wholesale purchasers, is slightly in excess of the contract hauler's freight rate for a haul from Birmingham to the place of ultimate delivery. However, the evidence discloses that the defendant took delivery of a considerable portion of his aggregate purchases from the terminal at Chattahoochee, Georgia, and plaintiff made no attempt to prove that there was any difference in the delivered price of this gasoline to customers close at hand and that secured on the delivery of gasoline purchased at Birmingham which involved a considerable haul.

The Court finds that in essence the transactions complained of, and the general business of the defendant was, that the defendant was engaged primarily in transporting gasoline to supply the needs of its retail stations, and that when in the course of business it was able to and could secure gasoline in excess of the amount required for such purpose, it would dispose of such excess by completing a sale theretofore made. At times such excess would be on the yard at the time of sale, but in the majority of cases gasoline would have to be purchased by the defendant in order to fulfill the prior order.

Sometimes defendant would take the order and agree to deliver at the time in the future desired by the purchaser; at others, and the more frequently, it would require from two to fifteen days for delivery. At some times the defendant would merely state to the prospective purchaser that [fol. 1157] it did not have any gasoline, but would get it as soon as possible. Defendant had no storage tanks. The truck would be sent to the terminal, either at Birmingham, St. Marks or Chattahoochee, with a check filled out but with the amount blank, and the terminal operator or seller would fill in the amount of the purchase price of the gasoline and invoice the same to the defendant, the load would be taken to the defendant's office in Atlanta and invoiced by the defendant at the sales price to the wholesale customer, and the truck then dispatched to such customer who would at

that time deliver to the driver of the truck, or within a few days thereafter mail, a check to the defendant for the invoice price at which the gasoline had been sold to such customer. The gasoline was purchased by the defendant at the terminal at a price per gallon, plus State and Federal taxes, and was invoiced by the defendant to his customer at a price of so many cents per gallon, and in some instances at a price per gallon, plus taxes. The purchasers from the defendant bought the gasoline F. O. B. their station at an agreed price per gallon which included freight and Federal and State taxes, and to use the words of a witness, "did not know and did not care" where the gasoline came from. From the invoices introduced in evidence, it appears that as to the transactions with the two purchasers chiefly relied upon, the gasoline was transported from Birmingham, Alabama, and as to these, while the price received by the defendant from its purchasers was as to each sale the same, the corresponding purchases at the terminal upon occasions varied by as much as .37 of a cent per gallon.

[fol. 1158] The defendant was concerned in the transportation to the extent that it enabled it to keep its trucks in full operation, and such wholesale sales of gasoline not needed in the conduct of its retail business earned for defendant additional profits, in the earning of which it was necessary that the defendant buy and transport the gasoline. Under present conditions, all gasoline was readily salable, and even if the same had not been secured in fulfillment of prior orders, could have been disposed of in the defendant's trade area without storage in bulk.

The plaintiff fails to show by a preponderance of the evidence that as to any transaction there was other than a bona fide sale of gasoline F. O. B. the purchaser's station, in which the purchaser was buying gasoline and was not concerned in the price or cost of transportation. The plaintiff does not show by a preponderance of the evidence that in case of the majority of the sales by the defendant at wholesale, the gasoline was purchased by the defendant after a sale of the approximate or equivalent gallonage to his customer.

In an application in February, 1943, before the alleged illegal transportations beginning June 12, 1943, to the office of Defense Transportation for authority to purchase additional equipment, defendant stated the need of such new equipment to be because it was "unable to buy or lease any

transport equipment. The equipment we now have is busy continuously and we are unable to keep up with orders on hand * * * our operation is the transportation of gasoline from the Southeastern Pipe Line Terminal to jobbers [fol. 1159] and gasoline agents in Georgia and South Carolina. It is our understanding that the Southeastern Pipe Line is approximately 200 orders behind. With the addition of this new piece of equipment we will be in a position to serve quite a number of additional agents." Following the denial of this application, in a letter seeking reconsideration, defendant stated: "As specified * * * we have been requested by the Republic Oil Company, the Southeastern Pipe Line Company, the Southport Gasoline Company, the National Oil Company, The Shell Oil Company, the Sinclair Oil Company and the Cities Service Company for equipment to transport gasoline in this area. All of these requests we were forced to refuse."

The defendant has failed to keep a driver's log in duplicate as required by the regulations of the Interstate Commerce Commission, and has likewise failed to secure or have in its files a certificate of physical examination signed by a qualified Doctor of Medicine for every new driver entering its employment as required by such regulations.

Defendant has not secured a certificate of public convenience and necessity from the Interstate Commerce Commission, nor has it filed policies of insurance or other security as required by the statute, nor has it filed with the Interstate Commerce Commission any rate or charge applicable to the transportation of property, or any minimum charge for such transportation of property.

[fol. 1160] DISCUSSION

Complainant contends that the decision in this case is upon the facts controlled by the rule in the case of A. W. Stickle Company v. Interstate Commerce Commission, 128 F. 2d 155. In addition, complainant urges the accepted rule that the Interstate Commerce Act is entitled to a liberal construction to effectuate the policy of the Act, and further, the established rule that the courts will look beyond the actual form of the transaction in determining whether questioned operations are those of a common or contract carrier, or private carrier. A. W. Stickle Company case, supra, and Georgia Truck System, Inc., v. Interstate Commerce

Commission, 5 Cir., 123 F. 2d 212. It also urges the accepted principle that interpretation of the statute by the Interstate Commerce Commission, the agent charged with its enforcement and operation, is entitled to great weight.

Upon consideration of the matter it appears that the real question for determination by this court is the actual nature of the transaction involved rather than a determination of the law, for if the operations of the defendant are those of a common or contract carrier, the complainant is entitled to the relief of injunction as sought. The Stickle case does not afford much help in determining the proper result in the present case. There the trial court found the circumstances of the transactions involved were transportations for compensation and that the Stickle Company was a common carrier. The Court of Appeals determined that there was sufficient evidence to sustain the finding [fol. 1161] under the facts in the case and thereupon held that the operations of the defendant were those of a contract carrier. The difference in the classification of the operations of the defendant by the trial court as those of a common carrier, and that of the Circuit Court of Appeals as those of a contract carrier, as well as the failure of the complainant in the present case to contend for any definite classification except that the defendant is not a private carrier, well illustrates that the difficulty inhering in the determination of any such a case is properly ascertaining the facts as to the actual circumstances of the operations, rather than a determination of the law. In the Stickle case the courts determined, under the facts there present, that the defendant was in fact engaged in the transportation of property for hire as a carrier. With this fact established, as a matter of law, the defendant became subject to all of the regulatory provisions of the statute including the proper subjection to an injunction by the court to prevent any violation thereof. The same court in Interstate Commerce Commission v. Clayton, 127 F. 2d 967, on the day prior to the decision in the Stickle case, held upon the facts there presented that the operations of the defendant were those of a private carrier. Thus each case must be determined by its own facts.

In this case, no extended discussion of the law involved is deemed necessary. Full findings of fact have been made.

As to the law, before the complainant is entitled to the [fol. 1162] injunctive relief sought, it is necessary for it to convince this court that the operations of the defendant was "transportation for compensation as a common or a contract carrier," as held by the Interstate Commerce Commission in T. J. McBroom Contract Carrier Application 29370, 1 M. C. C. 425. This appears to be an excellent statement of the test. Thus, not that the transportation might result in compensation as a matter of profits to the seller or transporter, but that the effect of the transaction is compensation as a common or contract carrier. In the Stickle case the court found transportation for such compensation. In the present case, while the court finds that the transportation resulted in profits to the defendant, that is, that it was necessary to transport in order to earn the profit, nevertheless I am unable to find, under the evidence, that there was involved in the transportation any idea of freight or carrier charges. Under the undisputed and uncontradicted evidence, it made no difference where the shipment originated, the cost to the purchaser was the same. I do not believe that the fact that profit, or compensation, may accrue as a result of transportation is a sufficient test, for if that be so, one who lost money as a result of deliveries for fixed freight charges would not be a carrier. The real question in any case to be determined is, looking beyond the form of the transaction and to its circumstances, whether the transportation is for compensation as a common or contract carrier, or whether such transportation is incidental to the operation of a commercial enterprise. In this connection, I find nothing in the statute which prohibits the conduct [fol. 1163] of a bona fide wholesale business, even if transportation is usually and even exclusively employed as a means of its conduct, provided the operation does not in fact place the operator within the classification of a common or contract carrier. Thus the fact that the defendant used no storage tanks, in itself does not subject it to the provisions of the statute.

It is true that ownership of the goods transported is not the sole test whether one is a private carrier or otherwise. However, where bona fide ownership is shown, that fact is, under the definition of private carrier contained in the statute, entitled to considerable weight. And where bona fide ownership is shown, together with a failure to prove transportation for compensation as a common or a contract

carrier, no proper basis exists for classification as a common or contract carrier. Indeed, this does not appear to be seriously questioned by the complainant, its contention is that the profit on the f. o. b. sales of the gasoline is the substantial equivalent of transportation charges between the points involved in the eleven transactions proved in detail, and that this, together with the evidence that the defendant always had an order before he purchased to fill it, shows that in essence the transaction was a subterfuge to evade the requirements of the statute. In view of the testimony from the complainant's witnesses that they purchased gasoline f. o. b. their stations, and neither knew nor cared from whence it came, and the testimony in behalf of the defendant that the prices charged were based upon competitive conditions in the respective localities, the in-
[fol. 1164] ference sought to be drawn by the complainant is not entitled to the weight claimed for it. This is not a case where the business relates solely to transportation and wholesale sales. It is shown by the evidence that more than half of the gasoline transported by the defendant was delivered to its retail stations and there sold. As to this portion of the business it is conceded by the complainant that the operations were those of a private carrier. Under the facts here I can find no substantial difference between such transportation for sale at retail and the transportation for sale at wholesale, and accordingly conclude that the complainant has failed to show that in its wholesale operations the defendant is either a common or a contract carrier.

Complainant relies heavily upon a statement made by the general manager of the defendant in which he admits that "we transport a spasmodic load now and then for somebody who calls in." Considering this statement in its context, and in connection with the evidence adduced upon the trial, I am unable to predicate thereupon a finding that the defendant's operations were the transportation of gasoline for compensation. The statement in its application to the Office of Defense Transportation that it had been requested to transport for various companies, is likewise not proof that it had been transporting, for it did not secure the additional equipment simultaneously stated to be necessary to carry on such operations.

[fol. 1165] In none of the decisions of the Interstate Commerce Commission cited and relied upon in the argument

here were the facts similar to those here involved, and in them the element of transportation for compensation as a common or contract carrier clearly appeared.

There lurks in the background of this case circumstances which give rise to a suspicion that some operations of the defendant may be different than those disclosed by the evidence presented. However this suspicion is not sufficient to override the positive testimony in the record. Nor, being in opposition thereto, does it aid in establishing complainant's case by a preponderance of the evidence.

From the statements made, it is apparent that there are other cases of a similar nature pending, and as the case will doubtless be appealed for final adjudication, no further discussion is necessary.

With reference to the matter of keeping of driver's logs and record of medical inspection, it is clear from the evidence that the defendant has failed to comply with the terms of the statute and regulations thereunder which are applicable to private carriers, and as to these matters, the complainant is entitled to an injunction to secure compliance with such statute and regulations. An order providing therefor may be presented.

[fol. 1166] CONCLUSIONS OF LAW

This court has jurisdiction of the parties and the subject matter.

The operations of the defendant are not subject to the provisions of the Motor Carrier Act so as to require it to obtain a Certificate of Convenience and Necessity, to file a tariff or statement of its minimum charges, or to file with the Commission the insurance or the filing and approval of surety bonds, qualifications as a self-insurer, or other securities or agreements by motor carriers subject to said Act, duly prescribed by said Commission pursuant to the provisions of Section 215 of said Act.

The complainant is entitled to an injunction to restrain the defendant from violating the Motor Carrier Act by failing to keep and preserve driver's logs and certificates of medical doctors certifying to the good health of the drivers employed.

Defendant should be taxed one-half of the costs of this proceeding.

Let a decree be presented by the plaintiff upon notice effectuating these conclusions of law.

This the 31st day of January, 1945.

(S.) Robert L. Russell, United States District Judge.

Filed in Clerk's office February 2, 1945. F. L. Beers, Clerk. By Ruth M. Stilwell, Deputy Clerk.

[fol. 1167] EXHIBIT "F"

To the Petition for Rehearing

No. 25

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

VALVOLINE OIL COMPANY, Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Brief for the United States and the Interstate Commerce Commission

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[fol. 1170] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1939

No. 25

VALVOLINE OIL COMPANY, Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Appeal from the District Court of the United States for the Western District of Pennsylvania

Brief for the United States and the Interstate Commerce Commission

Opinion Below

The opinion of the specially constituted District Court (R. 112-120) is reported in 25 F. Supp. 460. The reports of the Interstate Commerce Commission, upon which the challenged order is based (R. 12-19, 23-31), are published in 47 Val. Rep. 534 and 48 Val. Rep. 10.

Jurisdiction

The final decree of the District Court was entered December 29, 1938 (R. 120). Petition for appeal was filed Feb-

ruary 20, 1939 (R. 126), and was allowed the same day [fol. 1171] (R. 126-127). Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210-219, U. S. C., Title 28, Secs. 47 and 47 (a)), and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, U. S. C., Title 28, Sec. 345). This Court noted probable jurisdiction on April 17, 1939.

Questions Presented

1. Is appellant subject to the Interstate Commerce Act under the provisions of Section 1 (1) (b) and 1 (3)?

2. If appellant is subject to the Act, are its constitutional rights invaded by an order of the Interstate Commerce Commission, issued under Section 19a (e), requiring it to furnish certain information?

3. May appellant question the validity of provisions of the Act other than Section 19a (e); and if so, are they constitutional as applied to it?

Statutes Involved

The provisions of the Interstate Commerce Act (February 4, 1887, c. 104, 24 Stat. 379, as amended; U. S. C., Title 49) primarily involved are found in Sections 1 (1), 1 (1) b, 1 (3), 19a (a) and 19a (e), which provide in part as follows:

> Sec. 1. (1) That the provisions of this part shall apply to common carriers engaged in—
>
> • • • • • • •
>
> [fol. 1172] (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; • • •.
>
> (3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire.
>
> • • • • • • •

> Sec. 19a. (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this part • • •
>
> (e) Every common carrier subject to the provisions of this part shall furnish to the Commission or its agents from time to time as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier • • •.

Other pertinent provisions of the Interstate Commerce Act are set out in Appendix A, *infra*, pp. 48-52.

Statement

1. The Proceedings.—This is an appeal from the final decree of a three-judge district court for the Western Dis- [fol. 1173] trict of Pennsylvania, convened under the Urgent Deficiencies Act (c. 32, 38 Stat. 210-219, U. S. C., Title 28, Secs. 47, 47 (a)), dismissing for want of equity a petition to enjoin and annul an order of the Interstate Commerce Commission entered June 6, 1938. The order required appellant, hereinafter referred to as "Valvoline," to file with the Commission within a specified time certain maps, charts, and schedules required for the valuation of its pipeline property under Section 19a of the Interstate Commerce Act.

The order was issued under the following circumstances:

Pursuant to its statutory duty "to investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions" of the Interstate Commerce Act,[1] the Commission had, on December 31, 1934, issued "Valuation Order No. 26—Revised" (R. 9-10); requiring all pipe-line companies subject to the Act to prepare and file with the Commission maps, charts, and schedules of their properties not less than sixty days after receiving written notice from the Director of the Commission's Bureau of Valuation. Served

[1] Section 19a of the Interstate Commerce Act, *infra*, p. 50.

with this notice in January 1936, Valvoline asserted that it was not subject to the Act and petitioned the Commission [fol. 1174] to determine its status (R. 1). The Commission granted the petition and, after full hearing before Division 1, issued a report dated February 2, 1937 (R. 12-19), holding that Valvoline is "engaged in the transportation of oil by pipe line in interstate commerce and that it is a common carrier subject to the provisions of the Interstate Commerce Act," and "should, therefore, comply with our Valuation Order No. 26 and furnish promptly the information called for therein" (R. 19).

Evidence at this hearing disclosed that Valvoline was transporting crude oil in interstate commerce both for the use of its own refinery and for sale to an independent refining company in West Virginia (R. 42, 43). Shortly after the date of the Commission's report, Valvoline, admittedly in order to avoid being held to be a common carrier (R. 54), mechanically rerouted the oil transported to the West Virginia refinery (R. 62) so that this refinery was thereafter furnished only with oil produced in West Virginia and not moved across state lines.

Thereupon Valvoline petitioned for a rehearing alleging that this change in its operation was material to the determination of its status (R. 20). The petition was granted and a hearing was held before the full Commission. On June 6, 1938, the Commission rendered its report (R. 23-31) holding that the change in operation did not affect its prior [fol. 1175] determination, and directing Valvoline to comply with "Valuation Order No. 26—Revised" within ninety days (R. 31).

Valvoline thereupon instituted this suit, seeking both an interlocutory and a permanent injunction against enforcement of the order (R. 1-8). The Commission intervened and filed an answer (R. 36, 37). By agreement of counsel and with the court's consent, a single hearing was held on the prayer for both a temporary and a permanent injunction. Valvoline introduced in evidence a certified transcript of the testimony and exhibits introduced at both hearings before the Commission. No other evidence was offered. On December 6, 1938, the court below filed its opinion, findings of fact, and conclusions of law (R. 112-120), holding that Valvoline is subject to the Interstate Commerce Act and that it is required to comply with the

Commission's order. The final decree dismissing the petition was entered on December 29, 1938 (R. 120). On January 3, 1939, the court below stayed enforcement of the Commission's order pending decision by this Court (R. 124-125).

2. The Evidence.—The material facts, which are not in dispute, are as follows:

Valvoline's business originated in a partnership formed more than seventy years ago for the purpose of manufacturing lubricating oil. A small pipe line was constructed near Warren, Pennsylvania, through which oil was gath- [fol. 1176] ered for shipment in tank cars to the company's refinery at Edgewater, New Jersey. Later a refinery was built at Warren, and some of the oil was refined there and some at Edgewater. In 1901 the company was incorporated under the laws of the State of New Jersey and by its charter was authorized to engage in the production, manufacture, and marketing of petroleum oil and its products, and to engage in "any transportation business of any kind or character whatsoever," without, however, the right of eminent domain in New Jersey. At the time of its incorporation Valvoline was refining about 22,000 barrels of oil per month (R. 89, 113).

As the demand for lubricating oil grew, the pipeline system was gradually extended southward, following the development of new oil fields in Pennsylvania, and in 1909 another and larger refinery was added at East Butler, Pennsylvania. The movement of oil in that year amounted to about 55,000 barrels per month (R. 90, 113).

Up to that time all of the oil transported by Valvoline by pipe line moved intrastate. Interstate transportation began in 1913 upon the extension of the line from Pennsylvania into West Virginia, and in 1916 the West Virginia-Ohio boundary was crossed. The last major additions were in 1925 and 1926 when a gathering system serving pools in Ritchie County, West Virginia, was purchased and lines were laid in southeastern Ohio (R. 113).

[fol. 1177] At the present time Valvoline operates a connected system of pipe lines in Pennsylvania, Ohio, and West Virginia of a total length of 1,426 miles, comprising 969 miles of 2-inch pipe, 426 miles of 3-inch pipe, and 31 miles of 4-inch pipe (Exhibit 15). Through these lines it transports approximately 75,000 barrels of oil per month (R. 65), of which approximately 50% moves across state

lines. About 50% of the oil transported originates in Pennsylvania, 38% in West Virginia, and 12% in Ohio (R. 48, 113).

Several other oil pipe lines, both common carrier and private, extend through, or in close proximity to, the fields served by Valvoline. The common carriers have trunk lines of from 3 to 12 inches in diameter and carry a much larger volume of oil than is transported by Valvoline. None of them, however, serves the wells from which Valvoline receives its oil (R. 45, 113-114.)

Valvoline is not a producer of oil. From the inception of the enterprise it has been its practice to purchase all of the crude oil which it uses directly from the producers in the field and to carry in its pipe lines only oil of which it is the owner (R. 48, 114).

For its manufacturing purposes Valvoline prefers a select grade of oil of a light amber color. Some of the oils produced along its pipe lines are not satisfactory because they are too dark or contain undesirable ingredients difficult to eliminate in the refining process. It refuses to buy or admit into its lines oils that do not meet its [fol. 1178] specifications and the producers of such oil must, therefore, find an outlet through other pipe lines and sales to other refineries. Several instances of rejections of oil by Valvoline are mentioned in the record (R. 43, 46). However, any producer within reasonable distance of Valvoline's lines, having oil of the desired quality and not already receiving pipe-line service, is afforded a market for its oil through sale to Valvoline. One officer of the company testified (R. 43): "We have never rejected a well producing the kind of oil we need," and another stated (R. 47): "Once we have connected with a well which produces oil of the quality we desire, we handle all of the oil produced if he wants to give it to us." Valvoline pays the posted market price for the oil it purchases, except that producers whose wells are located in Ohio or West Virginia, or in Pennsylvania south of the Butler-Allegheny County line, receive a premium of 5 cents per barrel over this posted price (R. 45, 114).

In November 1937 Valvoline's pipe lines were serving exclusively 9,020 wells. These were mostly so-called stripper wells of small output, the average daily run for all of the wells being less than half a barrel per day per well. In the purchase of the output of these wells, Valvoline has

dealings with and accounts to 2,014 royalty owners and 1,751 lease operators. These owners and operators have no other present outlet for their oil. In the event Valvoline should refuse to accept it they could receive service [fol. 1179] from one of the other pipe-line companies but only if they were able to tender at least 5 barrels per day per mile of pipe-line extension necessary to make the connection. Since the average run of oil from the wells is much less than this amount, this requirement would deprive many of the producers of a pipe-line outlet and a market for their oil, should Valvoline refuse to carry it (R. 58, 114-115).

In 1932 economic conditions brought about a curtailment of operations, and the refinery at Warren was closed. Valvoline, instead of limiting its purchases to the quantity of oil that could be refined at East Butler, continued as before to purchase all oil of suitable grade offered in order not to lose the good will of the producers (R. 47). The result was that it received, and has continued to receive, an excess of oil over its ability to refine. Having no use for this oil in its own operations, it entered into arrangements with the Pennsylvania Refining Company at Karns City, Pennsylvania, and with the Ohio Valley Refining Company at St. Marys, West Virginia, under which it sells and delivers to those companies the excess of oil over its own requirements. The oil sold to the Pennsylvania Refining Company all originates in Pennsylvania, and its movement through Valvoline's lines is intrastate. At the time of the first hearing before the Interstate Commerce Commission some of the oil sold to the Ohio Valley Refin- [fol. 1180] ing Company originated in Ohio and moved across the Ohio-West Virginia State line. After that hearing, admittedly in order "to avoid any question of our status being held as a common carrier" (R. 54), Valvoline altered its operations so that oil delivered to this refinery consists exclusively of oil originating in West Virginia.[2]

---

[2] This change was effected by a simple mechanical process. The oil from Ohio is periodically held up in a tank at Bens Run, West Virginia, until oil for the West Virginia refinery can be pumped in the opposite direction from the West Virginia lines. When delivery is completed, the Ohio oil is released, mingled with West Virginia oil, and later with Pennsylvania oil, and transported to the Valvoline refinery at East Butler (R. 62).

In the case of both refineries the oil is sold at delivered prices, which include amounts to cover the cost of transportation (R. 51, 115).

Valvoline has never exercised the right of eminent domain. Its pipe lines have been laid over privately acquired easements and rights-of-way (R. 44). The arrangements under which it has laid its lines across public highways, rivers, and lines of other carriers do not appear of record.

Valvoline has never filed tariffs or reports with the Interstate Commerce Commission or with any other regulatory body (R. 50).

Summary of Argument

In three recent decisions this Court has held that the expense of furnishing information of the type required of [fol. 1181] appellant by the Commission's order does not constitute such substantial and irreparable injury as to justify equitable relief. *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209; *California* v. *Latimer*, 305 U. S. 255; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Since this expense is the only injury of which appellant may complain, its suit should be dismissed if it is governed by the ordinary principles of equitable jurisdiction. This Court has never decided, however, whether those principles apply to a suit which is brought under the Urgent Deficiencies Act to review an order of the Interstate Commerce Commission. It appears to have been general practice for a number of years to assume that the courts have jurisdiction over such a suit if only the order involved is final and the petitioner has a legal right or interest injuriously affected thereby. In view of this circumstance and because, in the opinion of the Interstate Commerce Commission, administrative convenience will be served by review of the particular order here involved, the Government does not insist upon this preliminary jurisdictional question but seeks a decision on the merits.

I

That appellant is subject to the Interstate Commerce Act under the provisions of Sections 1 (1) (b) and 1 (3) is clear both from the language of the Act and from the decision of this Court in *The Pipe Line Cases*, 234 U. S. 548. The Act [fol. 1182] applies to "common carriers engaged in • • • transportation of oil • • • by pipe line" between the

states, and "common carrier" is defined as including "all pipe-line companies." Since Valvoline is a pipe-line company engaged in the interstate transportation of oil, it comes directly within the statutory definition. Valvoline's contention that the Act applies only to those already engaged in pipe-line transportation as common carriers finds no support in the language of the statute and is precisely the argument which this Court rejected in *The Pipe Line Cases*, 234 U. S. 548. While the applicable sections of the Act have been amended in minor details since that decision, the amendment simply clarifies the language of the statute and does not make any important change in policy. Indeed, the Act as amended even more clearly applies to appellant than it did prior to its revision.

The further contention that *The Pipe Line Cases* are not decisive because appellant's operations differ from those of the companies there involved cannot be maintained. That decision was premised upon the principle that the provisions of the Act "apply to any person engaged in the transportation of oil by pipe line." Moreover, the Court there sustained the Act in its application to Tidewater Pipe Company, Ltd., whose operations were essentially the same as those of Valvoline.

Any lingering doubt that appellant is subject to the Act is dispelled by the legislative history of the statute which [fol. 1183] conclusively shows that the very two factors upon which Valvoline principally relies to exempt its operations from the Act—its common ownership and control of refinery and pipe line and its policy of transporting no oil other than its own—were the fundamental cause of the mischief at which the statute was directed.

II

There is no dispute that, if Valvoline is subject to the Act, the Commission had statutory authority under Section 19a (e) to enter the order here contested. The issue as to the validity of the order relates solely to its constitutionality.

Appellant argues that in deciding this issue the validity of the entire Act must be determined. It asserts that the order serves to change its status from that of a private to that of a common carrier, and thus can be supported only if Valvoline can constitutionally be required to assume the obligations of a common carrier under the Act. Moreover, it asserts that Section 19a (e) is inseparable from the

principal regulatory provisions of the Act and that if those provisions fail Section 19a (e) must likewise fail.

We take issue with appellant on both propositions. The Commission's order does not change appellant's status at all; it simply recognizes appellant to be a pipe-line com-[fol. 1184] pany subject to the Act. It is the Act, not the order, which determines appellant's obligations. The Commission has taken no action with respect to Valvoline under any provision other than Section 19a (e) and may never be called upon to take such action. Appellant itself admits that it cannot now be predicted in what manner or how seriously it may be affected by the requirements of the Act. Under these circumstances, a decision on the constitutionality of the entire statute would be an advisory opinion upon a hypothetical state of facts. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324; *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419; *California* v. *Latimer*, 305 U. S. 255.

The question is not affected by the separability or inseparability of Section 19a (e). Whether that Section is separable in the sense that it could stand alone if the remainder of the Act were held invalid, need not now be determined; whether separable or not, the present exercise of authority under that Section cannot be invalidated on the ground that at some future time appellant's rights may be invaded in the administration of other sections of the Act. Appellant may contest the validity of only that provision which presently causes it injury. *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571; *Heald* v. *District of Columbia*, 259 U. S. 114; *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217.

[fol. 1185] Since Section 19a (e) is admittedly valid in its application to appellant, we believe that the decree below must necessarily be affirmed.

Affirmance is required even if it be held that appellant has standing in this proceeding to question the validity of sections of the Act not now affecting it. There can be no dispute that Valvoline is engaged in interstate commerce; that it transports its own oil over its own lines does not prevent that transportation from being interstate commerce or exempt it from federal regulation. *The Pipe Line Cases*, 234 U. S. 548; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601. Nor can there be

doubt that the regulation imposed upon that commerce by the Pipe-Line Amendment does not constitute a violation of due process. In *The Pipe Line Cases, supra*, p. 561, this Court said: "So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid." See also *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U. S. 125. Since Valvoline did not commence interstate transportation of oil by pipe line until after the effective date of the Pipe-Line Amendment, these decisions are decisive of its validity as applied to appellant.

Even apart from this consideration, no violation of due process is involved. The purpose of the statute—to free the channels of interstate oil transportation from abuses [fol. 1186] which had arisen through common control of pipe line and refinery—is clearly within the Congressional competence, and the provisions of the Act as applied to ap-ellant have a real and substa*n*tial relation to that object.

Argument

Introductory Statement

Appellant presents the contentions in its brief that it is not subject to the provisions of the Interstate Commerce Act and that, if it is, the Act as applied to it is unconstitutional. We believe both contentions to be demonstrably unsound and that the decision below on the issues so posited is clearly correct.

Before proceeding to discuss these issues, however, a preliminary point of equity jurisdiction must be considered. In three recent decisions this Court has held that the expense of furnishing information of the type required of appellant by the Commission's order does not constitute such substantial and irreparable injury as to justify equitable relief.[3] *Petroleum Exploration, Inc.* v. *Public Service*

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[3] The only allegation of the petition with respect to the expense of furnishing the information is that it would require the "expenditure of large sums of money" (Petition, Par. IX, R. 7), and the only direct testimony on the question is the statement of appellant's vice-president that "It would mean a terrific expense to gather this information" (R. 65).

Commission, 304 U. S. 209; *California* v. *Latimer*, 305 U. S. 255; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. [fol. 1187] Since this expense is the only injury of which appellant may complain in the present case,[4] its suit should be dismissed if standing to maintain the suit depends upon the ordinary principles of equitable jurisdiction.

The question whether the ordinary prerequisites of equitable relief apply to a proceeding under the Urgent Deficiencies Act (38 Stat. 210, U. S. C., Title 28, Secs. 45, 47) to review an order of the Interstate Commerce Commission has never been determined by this Court. In several cases the Court has indicated that such a proceeding is equitable in nature. See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132; *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 315. In the *Rochester Telephone case* the [fol. 1188] Court stated (p. 132) that, where review is sought under the Urgent Deficiencies Act of an order of the Interstate Commerce Commission denying complainant's claim that is not within the statute, the complainant to secure relief must show "the conventional requisites of equity jurisdiction." Moreover, in *Alton R. Co.* v. *United States*, 287 U. S. 229, 240, Mr. Justice Brandeis, holding that the order there involved was reviewable under the Urgent

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[4] There can be no contention that the mere existence of the statute (enacted in 1906) creates presently threatened irreparable injury. See *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. Nor, as pointed out below, can it be maintained that the Commission's order serves to change appellant's status from that of a private to that of a common carrier and thus subjects it to irreparable injury from provisions of the Act other than Section 19a (e) under which the Commission's order was issued. The Commission has taken no action with respect to appellant under any other section, has made no order requiring a change in the company's mode of operation, and no demand or request for transportation service has ever been made upon the company. There is thus an entire want of any threat of injury, irreparable or otherwise, from the change in status which appellant erroneously claims the Commission ordered. *California* v. *Latimer*, 305 U. S. 255; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419.

Deficiencies Act, pointed out that "It subjects the Alton to damage which is substantial, immediate and irreparable." On the other hand, in several cases, this Court has reviewed orders of the Interstate Commerce Commission which seem to have involved no threat of irreparable damage, although the point of equitable jurisdiction was not raised or discussed. See, *e. g., Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134; *The Pipe Line Cases*, 234 U. S. 548; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. Moreover, in practice, petitions to review orders of the Interstate Commerce Commission under the Urgent Deficiencies Act have been treated as petitions as of right if only the order is final and the petitioner has a legal right or interest that will be injuriously affected by the order.

Because of this practice and because, in the opinion of the Interstate Commerce Commission, administrative convenience will be served by a review of the particular order [fol. 1189] which is here involved, the Government does not urge affirmance of the decree upon the ground that appellant has not shown irreparable injury. Affirmance is in any event required on the merits.

I

Valvoline Is Subject to the Interstate Commerce Act under the Provisions of Sections 1 (1) (b) and 1 (3)

That Valvoline is a common carrier within the definition of the Interstate Commerce Act is determined by the language of the statute itself and by the direct adjudication of the question by this Court in *The Pipe Line Cases*, 234 U. S. 548. And lingering doubt, if any there be, is effectively laid to rest by the legislative history of the statute.

The pertinent provisions of the Act follow (Sections 1 (1) (b) and 1 (3)):

> SEC. 1 (1) That the provisions of this part shall apply to common carriers engaged in—
>
> * * * * * * *
>
> (b) The transportation of oil * * * by pipe line * * * from one state * * * of the United States * * * to any other state * * * of the United States. * * *

(3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire.

[fol. 1190] That Valvoline is a pipe-line company engaged in the interstate transportation of oil is not challenged.[5] Authorized by its charter to "engage in * * * any * * * transportation business of any kind or character whatsoever" (R. 83), it operates a connected system comprising 1,426 miles of pipe line, through which approximately 75,000 barrels of oil are transported each month hundreds of miles from points of origin to points of destination (R. 44, 55). Fifty percent of the oil so transported moves across state lines (R. 48).

The fact that Valvoline is a pipe-line company is determinative of the fact that it is a common carrier within the meaning of the Act; Section 1 (3) expressly directs that the term "common carrier * * * shall include all pipe-line companies."

Valvoline's contention is that the term "pipe-line companies" is modified by the clause "and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." The contention entirely overlooks the fact that the quoted phrase is not a modifying dependent clause but an independent clause in the conjunctive. Its plain intent is to bring within the definition [fol. 1191] persons *in addition* to those specifically enumerated in the preceding part of the definition. The term "such transportation" refers to the "transportation" described in Section 1 (1) and (2); there is no mention of "transportation" in the preceding portion of Section 1 (3).

Valvoline's contention is precisely the argument which this Court rejected in *The Pipe Line Cases*, 234 U. S. 548. That case, like this, involved construction of Section 1 of

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[5] It is significant that Valvoline pays a federal tax (R. 15) imposed upon "all transportation of crude petroleum and liquid products thereof by pipe line." Revenue Act of 1932, Sec. 73 (a), 47 Stat. 275. Prior to 1932, the tax was imposed upon all "transportation of oil by pipe line." Revenue Act of 1918, Sec. 500 (d), 40 Stat. 1103.

the Interstate Commerce Act; the only distinguishing feature, and that adverse to appellant, is that at the time the decision was rendered the language of Section 1 gave superficial plausibility to the view that only common carriers, as that term is understood at common law, were included. The section at that time read in part as follows (34 Stat. 584):

> That the provisions of this Act shall apply to any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act.

This Court construed that provision to cover all pipe-line companies, whether operating as common carriers or not. It stated, 234 U. S. at 559, 560:

> The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe [fol. 1192] lines. The words who shall be considered and held to be common carriers within the meaning and purpose of this act obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but *an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such.* [Italics supplied.]

There is no merit in Valvoline's argument that the Transportation Act of 1920 (41 Stat. 456) so revised the language of Section 1 as to narrow its scope; the section as it now stands is even more clearly applicable to Valvoline than it was prior to its revision. The purpose of the revision was obviously only simplification of language; there was no intent to reverse the legislative policy of more than a decade. The bill which became the Transportation Act of 1920 was reported to the House and Senate by their conferees with the following comment on the section embodying the revision:

> Section 400 amends the first five paragraphs of section 1 of the Commerce Act, making minor corrections and

classifying language in several respects, but making no important change in policy. [Report No. 456, Nov. 10, 1919, to accompany H. R. 10453, 66th Cong., 1st Sess.].

[fol. 1193] Valvoline seeks to escape from the force of *The Pipe Line Cases* by urging that its operations are so different from those of the companies there involved that the decision is inapplicable to it. The contention disregards the decisive fact that this Court's decision was premised not so much on the operations of the particular pipe-line companies before the Court as upon the principle that the provisions of the Act "apply to any person engaged in the transportation of oil by means of pipe lines."

Beyond this, the contention is unsound because appellant's assertion that its operations differ from those of the companies involved in *The Pipe Line Cases* is contrary to fact.[6] Two of the companies, the Prairie Oil & Gas Co. and the Ohio Oil Co., were engaged solely in transportation. The oil purchased by them at the wells or from connecting carriers was sold again at the end of their lines. They operated no refineries. In this respect their operations may be distinguished from Valvoline's. But the decision of the Court holding the Tidewater Pipe Company, Ltd., subject to the Act is directly in point, since in no essential respect [fol. 1194] did the business of Tidewater differ from that of Valvoline.

Tidewater's lines extended from points of origin in Illinois, Pennsylvania, and New York to its refinery at Bayonne, New Jersey. It never operated as a carrier for hire, and carried only its own oil for the use of its own refinery. It possessed no right of eminent domain; all of its lines were built upon private rights-of-way or on

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[6] The facts as to the operations of the several companies are not stated in the majority opinion, but some reference is made thereto in the dissenting opinion of Mr. Justice McKenna (pp. 567-570) and they are briefly stated in the opinion of the Commerce Court, 204 Fed. 798, 802-803. In stating the facts of the case in the text of this brief we have had recourse not only to the opinion of the Commerce Court but also to the record in this Court, No. 508, Oct. Term, 1913.

Today, despite enactment of the statute, many, if not most, of the pipe-line companies still carry only their own [fol. 1200] oil to their own refineries.[12] If Valvoline is exempted from the Act because it operates in this manner, the present usefulness as well as the original purpose of the Act would in large measure be defeated. Every consideration of principle and authority repels the suggestion.

II

The Order of the Commission Does Not Impair the Constitutional Rights of Appellant

1. The Only Constitutional Issue Presented Is the Validity of Section 19a (e)

There is no dispute that if Valvoline is subject to the Act the Commission had statutory authority under Section 19a (e) to enter the order here contested. The issue as to the validity of the order relates solely to its constitutionality.

[fol. 1201] Appellant argues that in determining this issue the validity of the entire Act, as applied to its operations, must be determined. It advances two reasons in support of this claim. First, it asserts that the order serves to change its status from that of a private to that of a com-

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[12] See Splawn, *Report on Oil Pipe Lines*, H. Rep. 2192, 72nd Cong., 2d Sess. For purposes of this report pipe-line companies were classified as (1) large and medium-sized units integrated with the oil industry; (2) partially integrated and smaller integrated units of the oil industry (in which class Valvoline was included); and (3) independent pipe-line companies. Of the first group, operating 78 per cent of the pipe-line mileage, over 60 per cent of the companies reported that in 1931 they carried no oil other than their own in gathering lines and about 50 percent made a similar report on the use of their trunk lines. Of the second group, owning 3.5 percent of the pipe-line mileage, 8 out of 14 companies reported that in 1931 they carried no oil other than their own in their gathering lines and 2 out 5 no oil other than their own in their trunk lines. The third group, comprising independent pipe-line companies, of course carried nothing but "outside" oil.

mon carrier and thus can be supported only if Valvoline can constitutionally be required to assume the obligations of a common carrier under the Act. Secondly, it asserts that Section 19a (e), under which the order was issued, is inseparable from the principal regulatory provisions of the Act and that if those provisions fail Section 19a (e) must likewise fail.

We take issue with appellant upon both propositions. The Commission's order does not change appellant's status at all; it simply recognizes that Valvoline is a pipe-line company subject to the express provisions of the Interstate Commerce Act, and, as such, is required to comply with Valuation Order No. 26. Appellant's status is determined by the Act, not by order of the Commission.

Moreover, even if the order could possibly be construed as changing appellant's status from that of a private to that of a common carrier, appellant would nonetheless have no standing to call into question the validity of any provision of the Act other than Section 19a (e). The Commission has taken no action with respect to Valvoline under any other section, has made no order requiring a change in the company's mode of operation, and, as appellant states in [fol. 1202] its brief (p. 11), no demand or request for transportation service has ever been made upon the company. Indeed, appellant itself admits (Brief 30) that "it cannot be predicted * * * in what manner or how seriously" Valvoline may be affected by the requirements of the Act. Under these circumstances, a decision on the constitutionality of the entire statute would be an advisory opinion upon a hypothetical state of facts. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419; *California* v. *Latimer*, 305 U. S. 255.

In *California* v. *Latimer*, *supra*, it was held that a ruling by an administrative agency that a company is subject to the statute which the agency is engaged in administering does not of itself give the company standing to secure an injunction against enforcement of the statute. Specific action by the agency in relation to the company must be shown.

The *Electric Bond & Share* case is to the same effect. There the decree which this Court affirmed in effect required the defendant companies to register under the Public Utility Holding Company Act of 1935 and thus to change

their status from nonregistered companies, not subject to regulation, to registered companies subject to control by the Securities and Exchange Commission. This Court held that, despite the change of status required by the decree, defendants had no standing to seek, by way of cross-bill, an injunction against enforcement of provisions applicable [fol. 1203] to them as registered companies. The Court stated (p. 443):

> By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation. *Anniston Manufacturing Co.* v. *Davis* [301 U. S. 337].

See also *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, at 324.

The question is not affected by the separability or inseparability of Section 19a (e). Whether or not that section is separable in the sense that, if the remainder of the Act were held invalid, that section could be enforced alone, need not now be determined; whether separable or not, the present exercise of authority under that section cannot be invalidated on the ground that at some future time appellant's rights may be invaded in the administration of other sections of the Act.

The question of separability appears to be nicely balanced; although the primary purpose of the information furnished under the Section is to aid the Commission in rate regulation, it also serves as the basis of reports to Congress (Section 19a (d)) and as a means of regulating [fol. 1204] pipe-line companies through the deterrent force of publicity. Cf. *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419. Moreover, the valuation made on the basis of this information may serve a multiplicity of useful purposes other than rate regulation. See Sharfman, *The Interstate Commerce Commission*, Vol. III-A, p. 116. It is significant that Section 19a (e) provides that, unless otherwise ordered by the Commission with the reasons therefor, the records and data of

the Commission shall be open to examination by the public.

Even if Section 19a (e) is inseparable, however, an order issued pursuant to its provisions may not be attacked on the ground that other provisions of the Act are unconstitutional. This Court has many times reiterated the proposition that a legislative act is presumed to be constitutional until otherwise adjudged in an appropriate judicial controversy, and "that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226; *Heald* v. *District of Columbia*, 259 U. S. 114; *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. It follows, therefore, that for purposes of the present controversy, the provisions of the Act other than Section 19a (e) must be presumed valid. If those other provisions had in fact been struck down in actual controversy, it might be necessary to determine whether [fol. 1205] Section 19a (e) is too fragmentary to stand alone. But until such an occasion arises, the doctrine of separability cannot be invoked to defeat enforcement of the valid provision.

The proposition that appellant apparently espouses would make it the duty of a court to examine every provision of an allegedly inseparable statute in order to determine, not whether a particular provision sought to be enjoined is constitutional, but whether there are a sufficient number of other valid provisions to make worth while the enforcement of the valid provision in controversy. No such proposition has ever been recognized.

The present situation is closely analogous to that presented in *Heald* v. *District of Columbia*, 259 U. S. 114. That case involved an attack upon a statute, constitutional as applied to the complainants but alleged to be unconstitutional in its application to others. The complainants contended, just as does appellant here, that the statute was inseparable, and that if it was invalid in part it was void *in toto*. But this Court denied injunctive relief, holding that the complainants had no standing to attack the validity of parts of the statute which did not affect them in order to nullify the part which did affect them. See also *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571; *Yazoo & M. V. R. Co.* v.

Jackson Vinegar Co., 226 U. S. 217; *Hatch v. Reardon*, 204 U. S. 152; *Blackmer v. United States*, 284 U. S. 421. By parity of reasoning, the appellant here cannot contest the validity of sections of the Act not presently affecting it in [fol. 1206] order to nullify the particular section under which it has been ordered to furnish information.

2. Considered by Itself, Section 19a (e) Does Not Impair the Constitutional Rights of Appellant

Since no contention is made that Section 19a (e), considered by itself, is invalid as applied to appellant, it may be assumed that its separate validity is admitted. The admission is indeed compelled since the decisions of this Court allow of no doubt that Congress may require a company engaged in interstate commerce to furnish an administrative agency with relevant information concerning its operations. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *Electric Bond & Share Co. v. Securities and Exchange Commission, supra.* The cases cited are conclusive that such regulation is neither beyond the commerce power of Congress nor violative of the requirements of due process. If, therefore, we are right in our view that appellant has no standing to contest the validity of any other regulatory provisions in order to nullify Section 19a (e), the decree below must necessarily be affirmed.

3. The Principal Regulatory Provisions of the Act Are Constitutional as Applied to the Appellant

Affirmance of the decree is required irrespective of the standing of appellant, in the present proceeding, to question the validity of those sections of the Act which impose [fol. 1207] upon pipe-line companies at least some of the obligations of a common carrier. *The Pipe-Line Cases*, together with many other decisions of this Court, disclose that appellant's constitutional contentions are without substance.

The principal provisions which appellant attacks are those which require pipe-line companies, as a condition of engaging in the transportation of oil, to make their transportation facilities available to others "upon reasonable request" therefor (Section 1(4)) and to charge "reasonable" rates for the use of their pipe lines by others (Sec-

tion 1 (5)). Valvoline claims that if it is subjected to these provisions, it will be required to carry in its lines the ordinary pipe-line grade of crude oil in addition to the select grade of amber color oil which it now purchases and for which its refinery is designed. It asserts that large expenditures will be necessary to adapt its filtering, pumping, and other facilities to such operation.

It is obvious that appellant is conjuring up an entirely speculative injury on which to premise its constitutional argument. The actual fact is that Valvoline has never been requested to transport oil for anyone and that no producer or regulatory body has ever lodged a complaint against the company's present mode of operation. The Act does not automatically require Valvoline to change its operations. Valvoline may, in the first instance, file tariffs, rules, and regulations taking into account the necessities of its own [fol. 1208] particular situation. And certainly it is fair to assume that if at some future time a request is made of Valvoline for the use of its transportation facilities, the Commission, in determining whether the request is reasonable, will give due weight to appellant's method of operation, its policy of receiving into its lines only a certain grade and color of oil, the capacity of its lines, the other facilities available, and appellant's need of oil for its own refinery. Indeed, one of appellant's own officers testified (R. 51) that "If we are treated as a common carrier, I don't believe that we will have very many receipts from transportation of other people's crude oil. Except in certain cases, the same company would necessarily continue to carry practically exclusively its own oil." It is against this factual background that appellant's arguments must be viewed.

That Valvoline, in the operation of its pipe lines, is engaged in interstate commerce is beyond dispute. The fact that it simply transports its own oil over its own lines does not prevent that transportation from being interstate commerce or exempt it from federal regulation. *The Pipe Line Cases*, 234 U. S. 548; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.[13] The only pos-

[13] Appellant cites *Pennsylvania R. R. Co.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170, as holding that transportation by a coal company of its own coal on its own

[fol. 1209] sible question, therefore, is whether the regulation imposed upon that commerce by the statute constitutes a taking of appellant's property without due process of law.

Here again *The Pipe Line Cases* furnish the definitive answer. This Court there upheld the Act against the challenge that it deprives pipe-line companies of their property without due process of law and takes such property for public use without just compensation. The Court held that there was no taking of property whatever and that "The whole case is that the appellees if they carry must do it in a way that they do not like" (p. 561). Mr. Justice Holmes, speaking for the Court, added the following emphatic dictum which, in our view, completely disposes of appellant's argument (p. 561):

> So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be [fol. 1210] established there can be no doubt that it is valid.

Valvoline did not lay any of its interstate pipe lines nor transport any oil by pipe line in interstate commerce until after August 28, 1906, the effective date of the pipe line amendment. By its own voluntary act, therefore, Valvoline subjected its property to the conditions of the statute and may not now be heard to say that enforcement of those conditions constitutes a violation of due process.

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barges down certain rivers in Pennsylvania and thence by rail over its own private tracks to Ohio was not "in commerce" (Brief 21). This interpretation of the decision is contradicted by the language of the opinion. Mr. Justice Cardozo stated (p. 174): "The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission." The Court construed the Act as applying to rail and water transportation only when conducted by common carriers. Therefore, it found that the transportation involved in that case was not subject to the Act.

In *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U. S. 125, this Court made significant use of the dictum of Mr. Justice Holmes, quoted above. In that case the action of a state in requiring a foreign corporation to operate its local private oil line as a common carrier was upheld on the ground that the state law, pursuant to which this action was taken, was in force when the corporation entered the state. The Court stated (p. 128):

> • • • the contention that this order, of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law must be pronounced futile to the point almost of being frivolous. "By accepting the privilege it voluntarily consented to be bound by the conditions" attached to it (216 U. S. 56, 66), and, while enjoying the benefits of [fol. 1211] that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the State, is unconstitutional. *A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the* Pipe Line Cases, *234 U. S. 548, 561, in a single sentence, saying: "So far as the statute contemplates future pipe lines and prescribes conditions upon which they may be established there can be no doubt that it is valid."* [Italics supplied.]

But even apart from the fact that appellant began the interstate transportation of oil by pipe line after the effective date of the Act, the provisions of the Act do not deprive it of its property without due process of law. The purpose of the statute—to free the channels of interstate oil transportation from abuses which had arisen through common control of pipe line and refinery—is clearly within the Congressional competence, and the provisions of the Act as applied to appellant have a real and substantial relation to that object.

In many situations the possession of a pipe line is a strategic factor of the utmost importance in the petroleum industry. As a practical matter, the oil producer may well be completely shut off from the market if he does not have a pipe-line outlet. Furthermore, if he has access to only

one pipe line, the owner of that line has it within his power [fol. 1212] to refuse to receive any oil except such as is sold to him before it enters the pipe line, and otherwise to dictate the terms and conditions on which the oil shall be transported. Refiners in many cases must have access to pipeline connections if they are to compete on equal terms with other refiners who have such connections. In the absence of regulation, therefore, a refiner who owns a line may possess substantial economic power over a large number of producers and over other refiners who are his competitors.

Under these circumstances there can be no substantial doubt that Congress was competent to prevent the economic power inherent in pipe-line ownership from being abused. See *The Pipe Line Cases*, 234 U. S. 548. Valvoline does not deny this, but asserts that it is only the main trunk pipe lines of the country which have such economic power. It contends that its operation, which is comparatively small, is incapable of participating in any evil on a national scale and consequently that the provisions of the Act are arbitrary and unreasonable as applied to it.

The contention is directly contravened by *Brass* v. *Stoeser*, 153 U. S. 391. That case involved the constitutionality of a North Dakota statute regulating all grain elevators without any restriction as to size or geographical location. The complainant elevator company sought to distinguish the prior decisions of the Court in *Munn* v. *Illinois*, [fol. 1213] 94 U. S. 113, and *Budd* v. *New York*, 143 U. S. 517, which upheld similar statutes of Illinois and New York, on the ground that those laws were "intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages . . . present no such opportunities" (153 U. S. at 402). The evidence showed that there were about 600 grain elevators along the line of the Great Northern Railroad in North Dakota, that the business was keenly competitive throughout the State, and that at the very station where defendant's elevator was located two others were operating. The

Court found in these factual distinctions no reason for denying the legislative power, stating (p. 403):

> These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be [fol. 1214] legally exerted over the same business when carried on in smaller cities and in other circumstances.
> * * *

See also *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201-202; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511-512, 514; *South Carolina State Highway Department* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 190-191; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154.

Moreover, there is no foundation in the record for the belief that the application of the Act to appellant may not result in the public benefits contemplated by Congress. The record is clear that should Valvoline refuse to purchase the oil of a producer, that producer would, in all save a few instances, have no other access to the market. That Valvoline has not in the past chosen to discriminate or prefer does not militate against its potential power to do so. It claims that the price which it pays for oil is governed by the competitive market and that it exercises no control over the price, yet it pays a premium of five cents a barrel over the posted market price on all oil moved in interstate commerce because "it is worth more to us" (R. 45). Clearly it is in control of this premium price, and were it to refuse to carry and the producers could transport their oil only by other carriers, they would lose at least the premium which their product presumably deserves. Moreover, Valvoline controls the delivered price which it charges the two inde- [fol. 1215] pendent refineries it is now serving, and should it decide to cut off their supply, they would be forced to buy the mixed grade of the common carrier lines. That these producers or refineries may never have cause to complain is not important. The validity of the statute depends upon its effect in situations that may reasonably be conceived.

purchased land. Like Valvoline, Tidewater's refinery was designed to refine only certain grades of oil. Its pipe lines extended only to those fields which produced sweet or nonsulphurous oil suitable for its refinery, and it contended that if its lines were used to transport sour or sulphurous oil as well, the sweet oil would be contaminated and the company subjected to irreparable loss.

In two respects Tidewater's claim for exemption as a purely private line was stronger than the claim advanced by Valvoline. Unlike Valvoline, it did not purchase all of its oil from the public, but was itself the owner of large producing acreage in Pennsylvania and Illinois, and, unlike Valvoline, it did not sell any oil transported by it to other refineries. Its own refinery consumed the entire capacity of its lines.

The actual operation of Tidewater's lines differed from Valvoline's operation in only two respects, neither of which [fol. 1195] is determinative: (1) the volume of oil transported was much greater, but the language of the statute clearly does not tolerate any limitation of degree; and (2) Tidewater's lines were connected with other pipe-line systems, but the oil so received was purchased at the connection points and transported over Tidewater's lines to its refinery as its own oil. The only effect of its connection with other pipe-line systems, therefore, was to afford a market to a greater number of producers than would otherwise have been the case.[7]

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[7] It cannot be contended that Tidewater was held subject to the Act on the ground that it was part of the Standard Oil Company system and monopoly by reason of the fact that Standard Oil controlled 30% of the stock of the Tidewater refinery. In the anti-trust action which the Government brought against the Standard Oil Company and its subsidiaries to dissolve their monopoly, Tidewater was made a party defendant. The action was dismissed as to it at the conclusion of the evidence upon the finding of the trial court that Tidewater had not "been proved to be engaged in the operation of carrying out the combination" (Record, *United States* v. *Standard Oil Co.*, No. 398, Oct. Term, 1910, Vol. 17, p. 525). That decision was rendered four years prior to the decision in *The Pipe Line Cases.*

The essential feature of Tidewater's operation, which this Court held determinative of its status under the statute, was that it afforded a market to the producing public and was, in the words of the Court (p. 559), carrying "a great subject of international commerce coming from many owners but * * * carrying it all as its own." Valvo-[fol. 1196] line is performing this identical function on a smaller scale.[8]

Valvoline relies upon that part of the decision in *The Pipe Line Cases* which held that the Uncle Sam Oil Company did not come within the terms of the Act. This Company operated a three-inch pipe line from its own oil wells near Bartlesville, Oklahoma, a distance of about 60 miles to its refinery at Cherrydale, Kansas. The company purchased no oil.[9] No other producer or member of the oil shipping

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[8] Appellant cites the decision of the Supreme Court of Illinois in *Tidewater Pipe Co.* v. *Board of Review*, 311 Ill. 375, 143 N. E. 87, and a curious dictum in the opinion to the effect that Tidewater is not a "common carrier" under the Pipe-Line Amendment because it transports only its own oil over its own lines to its own refinery. Apparently, that court inadvertently overlooked the fact that this very company had been held subject to the Act by this Court in *The Pipe Line Cases*. The dictum was merely an incidental expression of opinion, not germane to the decision, the question at issue being whether oil purchased by the company in Illinois and stored for a long period of time prior to its movement out of the state, was taxable by Illinois. The court made it clear that its decision that the oil was taxable did not turn upon the status of the company as a private or common carrier.

[9] In its brief (p. 14) Valvoline states, "Whether the Uncle Sam Oil Company transported only oil which it produced or whether it also purchased oil is not clear." This statement is based upon the opinion of the Commerce Court and upon Mr. Justice McKenna's statement in his dissenting opinion (p. 573) that "The extent to which it [Uncle Sam Oil Company] purchases oil from producers, if it does so at all, does not appear from the record." But Mr. Justice Holmes, for the Court, said (p. 562) that the pipe-line was "used for the sole purpose of conducting oil from its own wells to its own refinery." This was the allegation of the company's original petition for an injunction and there is

[fol. 1197] public was directly or indirectly interested in its operation or relied upon it either as a transporter or purchaser of oil.

Mr. Justice Holmes, for the Court, said (p. 562):

> This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, *and that is all*, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end.[10] [Italics supplied.]

[fol. 1198] The determining factor in the *Uncle Sam Oil Company* decision was not the common ownership of pipe line and refinery. Tidewater, the Standard Oil Company of New Jersey, and the Standard Oil Company of Louisiana were all held subject to the Act, although each of them simply transported its own oil over its own lines to its own refinery. The determining factor was that the Uncle Sam Oil Company did not purchase any oil from producers, had

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no evidence in the record to the contrary. Chief Justice White, concurring, said (p. 563); "It is shown beyond question that the company buys no oil * * *." Whatever the actual fact may have been, the Court based its decision upon this assumption.

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[10] Chief Justice White was of the opinion that even this company's operations fell within the meaning of the Act (p. 562), but he concurred in the result since he believed that to apply the Act to this company, whose pipe-line operations were begun prior to the passage of the statute, would deprive it of its property without just compensation in violation of the Fifth Amendment.

no substantial transportation system, and had no direct or indirect relation with the producing public."[11]

Valvoline cannot be exempted from the Act on similar grounds, since it affords a market in three States for 9,020 wells and 1,751 lease operators, representing 2,015 royalty owners. It has never refused to buy and admit into its lines oil that meets its specifications (R. 43). Whatever limitation the decision in *United States* v. *Uncle Sam Oil Co.* may be deemed to have put on the literal terms of the Act, appellant, as an interstate carrier transporting for hundreds of miles "a great subject of international com- [fol. 1199] merce coming from many owners" (234 U. S. at 559) does not fall within it.

We believe that the language of the statute itself and the decision of this Court in *The Pipe Line Cases* conclusively refute petitioner's claim of exemption. Under these circumstances we do not feel justified in laboring the argument by tracing here the legislative background of the Act. For the convenience of the Court, the statutory history is outlined in Appendix B, *infra*, pp. 53-57.

That history has striking application to the present case, for it reveals that the very two factors upon which Valvoline principally relies to exempt its operations from the Act—its common ownership and control of refinery and pipe line and its policy of transporting no oil other than its own—were the fundamental cause of the mischief at which the statute was directed. It was not the practices of common carriers or carriers of oil for hire which called forth the legislation, but rather the duress to which well owners and independent refiners were subjected by companies whose common control of pipe line and refinery gave them the economic power both to dictate the price of oil and to insist that all oil which they transported be sold to them before its transportation.

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[11] In his dissenting opinion, Mr. Justice McKenna said (p. 573): "And I take it if the companies had not made purchases of oil or refused offers of oil, they would not be held subject to the act. Such is the situation of the Uncle Sam Company and the ground of decision in regard to that company. It is not held to be within the act. * * * It may be supposed that if it venture to make purchases of oil it will lose its immunity."

It is immaterial that Valvoline, as a small independent refiner transporting oil for the use of its own refinery, cannot exercise monopolistic control over the production and marketing of oil on a nation-wide scale. The test of whether it can be subjected to regulation is not whether it presently enjoys a monopoly, is large in size, or has engaged in evil practices. As this Court stated in *Nebbia* v. *New York*, 291 U. S. 502, 534, "The touchstone of public interest in any business * * * clearly is not * * * the enjoyment of a monopoly." See also *Brass* v. *Stoeser*, 153 U. S. 391. The real question is whether the company falls in the general category of enterprises which Congress can regulate in order to achieve a legitimate purpose. In view of the history of the oil industry and of the evils which Congress sought to eliminate by enactment of the Statute, the constitutional propriety of including all pipe-line companies within the scope of the regulation, irrespective of questions of size or degree, is beyond question.

[fol. 1216] CONCLUSION

It is respectfully submitted that the decree of the court below dismissing the petition for want of equity should be affirmed.

Robert H. Jackson, Solicitor General; Thurman Arnold, Assistant Attorney General; Hugh B. Cox, Elmer B. Collins, Frank Coleman, Special Assistants to the Attorney General; Thomas M. Ross, Assistant Chief Counsel, Interstate Commerce Commission; Richard H. Demuth, Special Attorney; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Of Counsel.

October 1939.

[fol. 1217] APPENDIX A

The pertinent provisions of the Interstate Commerce Act (Feb. 4, 1887, c. 104, 24 Stat. 379, as amended U. S. C., Title 49, Secs. 1, 19a), are as follows:

SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly

by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but [fol. 1218] only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivery, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; or

(b) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this part except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as

used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, [fol. 1219] including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * * * * *

SEC. 19a (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this part, except any street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Commission may in its discretion investigate, ascertain, and report the value of the property owned or used by any such electric railway subject to the provisions of this part whenever in its judgment such action is desirable in the public interest. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners, who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall, subject to the exception hereinbefore provided for in the case of electric railways, make an inventory which shall list the property of every common carrier subject to [fol. 1220] the provisions of this part in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as prac-

ticable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

* * * * * * *

(d) Such investigation shall be commenced within sixty days after approval of this part and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Every common carrier subject to the provisions of this part shall furnish to the Commission or its agents from time to time and as the Commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the Commission free access to its right-of-way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the Commission in the work of the valuation of its property in such further particulars and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this part shall have the full force and effect of law. Unless otherwise ordered by the Com- [fol. 1221] mission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public.

* * * * * * *

(k) The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission, such carrier, receiver, or trustee shall forfeit to the United States the sum of $500 for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same

manner as other forfeitures provided for in section 16 of this part.

(l) The district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section.

[fol. 1222] APPENDIX B

Legislative Background of the Pipe-Line Amendment

A rich source of material throwing light on the background of the Act is the voluminous record in the case of *Standard Oil Co.* v. *United States*, 221 U. S. 1.[1] That record reveals clearly that it was not the practices of *bona fide* common carriers or carriers for hire of oil by pipe line that gave rise to the existing evils, but rather the common control and ownership of pipe line and refinery and the policy pursued by pipe-line companies of transporting only oil produced by them or purchased by them at the wells from the producing public.

When *The Pipe Line Cases* were before the Commerce Court in 1912, it was stipulated that the testimony taken in the case of *Standard Oil Co.* v. *United States*, *supra*, should be considered by that court in determining the meaning of the Pipe-Line Amendment. That court, after a consideration of this record and the record before the Commission, [fol. 1223] observed (*Prairie Oil & Gas Co.* v. *United States*, 204 Fed. 798, 801):

> Some of these pipe lines, aggregating a large mileage, are admittedly subject to public regulation, because

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[1] While the evidence in the *Standard Oil Company* case was taken and the case decided a few years after the passage of the Pipe-Line Amendment, the record was directed at conditions existing during the preceding two decades and reveals the facts with which Congress was undoubtedly familiar when, in 1906, it debated and enacted the Pipe-Line Amendment.

their owners are public-service corporations engaged in the business of common carriers; but many of them belong to private companies, which use them only in the conduct of their private business. The private lines in most instances are owned or controlled by the refineries to which they transport crude oil and which they exclusively serve.

The construction of pipe lines, such as are owned by these petitioners, involves a large outlay of capital, and few producers of the crude article are able to provide themselves with such a facility for marketing their output. Consequently, and because the cost of railroad transportation is prohibitive, the great majority of oil producers find it to their interest to sell at the wells to the owners of pipe lines, and, as a practical matter, may have no other alternative. For this reason it comes to pass that these private pipe line companies transport not only the oil supplied by their own wells, but also the much greater amount purchased by them from other producers.

Pipe lines were not originally included in the "rate bill" introduced in the Fifty-ninth Congress (first session), and not until the bill had passed the House and was being debated in the Senate was the amendment offered. Senator Lodge, of Massachusetts, offered it on May 4, 1906 (40 Cong. Rec. 6361), shortly after the receipt by the Senate of a special message from the President transmitting a summary of the report of the Commissioner of the Bureau of [fol. 1224] Corporations on the subject of the oil industry.

Immediately Senator Foraker, of Ohio, arose to state (40 Cong. Rec. 6361):

I do not want to make any opposition to the Senator's amendment, but it occurs to me that the amendment ought to be further amended, so as to provide that it shall apply only to pipe lines operated for the public. I do not understand how you could compel a man who has a private pipe line of his own to become a common carrier. * * * I think such a limitation ought to be put in the Senator's amendment by an amendment to the amendment that it shall apply to all pipe lines that are carrying for the public, and not to private lines that an individual or a single corporation may have laid down and put into operation for its own benefit. * * *

Senator Nelson, of Minnesota, and Senator Lodge then replied:

> Mr. Nelson: In reference to the amendment suggested by the Senator from Ohio to the amendment of the Senator from Massachusetts, I desire to state that if that amendment is adopted it will practically nullify the provision, because every one of these pipe lines can say "we refuse to do business for the public." Practically the [original] amendment would be of no use at all. [Ibid. p. 6365.]
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> Mr. Lodge: Mr. President, the purpose of this amendment is to bring the transportation of oil and other commodities within the interstate-commerce law. Oil is one of the greatest articles of interstate com- [fol. 1225] merce carried in this country, and it is now absolutely outside and beyond any Government regulation whatsoever. • • • But the amendment suggested by the Senator from Ohio to my amendment, to the effect that no pipe line, unless it carries for the public, shall come under this rule, will, as the Senator from Minnesota [Mr. Nelson] says, absolutely destroy the value of my amendment. [*Ibid.*, p. 6365.]
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> • • • • • • •
>
> Those well owners are absolutely at the mercy of the pipe lines. I have had cases brought to me, which in this fifteen-minute debate I cannot enlarge upon, where an independent refinery has been deprived of its supply of oil because it would not agree to the prices of the pipe lines. A small well owner is compelled to take the price that is offered by the controller of the trunk line. • • • The pipe-line companies buy the oil they use in their own refineries and owing to the fact that they buy the oil, if you put in the words "carry for the public," the pipe lines go right out from under this amendment, in my judgment. • • • There is no proposition • • • to push up the prices or push down the prices and make it impossible for a pipe line to operate. It is simply to give relief, if relief is sought, to those who find that they are not fairly treated or think they are not fairly treated by the pipe

lines, through which alone practically they can get their commodity to market. [*Ibid.*, pp. 6365-6366.]

During the course of the debate an attempt was made to amend the amendment so that it would apply only to carriers "for the public" or to "transportation for hire" or [fol. 1226] "for compensation" (*Ibid.*, p. 7000), but it was unsuccessful. Senator Lodge vigorously opposed it, saying:

> If you put in the words "transportation for hire" or "transportation for the public" you absolutely destroy this amendment so far as its effectiveness is concerned. The method of getting the oil is, as a rule, that the Standard Oil Company or the Pure Oil Company, which are the two great carriers of oil, buy it of the well owner and carry it, and they would immediately say they were not carrying for the public; that they were carrying for themselves. That is the reason why the word "public" or "transportation for hire" put in there would immediately wreck this amendment [40 Cong. Rec., p. 7000].

[fol. 1227] EXHIBIT "G" TO THE PETITION FOR REHEARING

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1939

No. 25

VALVOLINE OIL COMPANY, Appellant,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Appeal from the District Court of the United States for the Western District of Pennsylvania

Brief on Behalf of the Valvoline Oil Company

J. Campbell Brandon, Butler, Pennsylvania; Harry S. Elkins, Munsey Building, Washington, D. C., Counsel for Valvoline Oil Company.

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[fol. 1231] Opinions

The opinion of the specially constituted District Court for the Western District of Pennsylvania is reported in *Valvoline Oil Company* v. *United States and Interstate Commerce Commission* in 25 F. Suppl. 460 and appears in the record p. 112.

[fol. 1232] The report of Division One of the Interstate Commerce Commission requiring the submission of data for valuation purposes is reported in 47 Val. Rep. 534 and is printed in the record p. 12. The report of the Commission on Further Hearing is reported in 48 Val. Rep. 10 and is printed in the record p. 23.

Jurisdiction

The final decree of the specially constituted court (R. 120) was entered December 29, 1938. The petition for appeal was filed (R. 126) February 20, 1939, and an order allowing the appeal was made the same day.

The jurisdiction of this Court is founded upon the following statutes:

Acts of June 18, 1910, C. 309, Sec. 1, 36 Stat. 539; March 3, 1911, C. 231, Sec. 209, 36 Stat. 1149; October 22, 1913, C. 32, 38 Stat. 219, U. S. C. A., Title 28, Secs. 45 and 45a.

Section 238 of the Judicial Code as amended by the Act of Feb. 13, 1925 (C. 229, § 1, 43 Stat. 938, U. S. C. A., Title 28, Sec. 345, par. 4).

Urgent Deficiencies Act of October 22, 1913 (C. 32, 38 Stat. 219, U. S. C. A., Title 28, Secs. 45 and 47a).

Questions Involved

The Bureau of Valuation in 1935 directed the Valvoline Oil Company to file its valuations and certain other data with the Interstate Commerce Commission not later than March 7, 1936 (R. 2). The Valvoline Oil Company never having been required to fulfill any other requirements of a common carrier refused on the grounds that its operation was private and that it did not hold itself out to the public as a common carrier. The appellant was not organized to operate a pipe line and only carries its own oil by pipe line as incidental to the operation of its refineries. The [fol. 1233] Commission ruled that under the Hepburn Act and its amendments that it was its duty to require the appellant to submit this data for valuation purposes holding that the Valvoline Oil Company was a common carrier within the terms of the act. In passing on this question the Federal Court restricted its opinion to the one question of filing data requested but did not declare the appellant a

common carrier for all purposes. The questions before this Court are:

(A) Whether under the fact the Valvoline Oil Company can be held to be a common carrier.

(B) Whether the Valvoline Oil Company can be compelled to file data for valuation of its properties if it is not a common carrier.

(C) Whether the lower court erred in directing compliance with the Interstate Commerce Commission's order for valuation without determining the Valvoline Oil Company's status.

(D) Whether the decree of the lower court is constitutional.

Statement

This is a direct appeal from the decree of the United States District Court for Western District of Pennsylvania sitting as a specially constituted three judge court dismissing the petition for an injunction and directing the Valvoline Oil Company to comply with the order of the Interstate Commerce Commission for filing data with the Bureau of Valuation of the Interstate Commerce Commission.

The Valvoline Oil Company is one of the oldest refining companies in this country. It owns and operates refineries at Butler, Pennsylvania, and Warren, Pennsylvania, for the manufacture of high grade lubricating oils and other products from selected Pennsylvania crude oil.

[fol. 1234] Beginning as a partnership in 1868 in Brooklyn (R. 65) to refine crude oil it continued until 1901 when a New Jersey Charter was granted to the company (Exhibit No. 4, R. 82). Gathering pipe lines were laid prior to 1890 (R. 66) and have been extended to various fields of oil development in Pennsylvania. In 1913 (R. 44) the company extended its lines to Cairo, West Virginia, and in 1926 into Ohio. It now operates in these three States, gathering oil for the Butler refinery, the Warren refinery having been shut down since 1932 (R. 47).

The Valvoline Oil Company's operation is unique. It buys the crude direct from the producer and lays its lines to the producers' tanks. The day the oil is run from the producers' tanks it is bought by the Valvoline at the price

fixed and quoted by the common carrier pipe lines in that district without any charge for pipeage or transportation. The Valvoline produces no oil and has nothing to do with the price regulations on crude oil (R. 45). In order to have lubricating oil of high quality and color to meet the exacting demands of trade, both domestic and foreign (R. 52), the Valvoline early found it necessary to take only selected crude. Laboratory tests are made for color and various ingredients and oils that fail to meet these requirements are refused (R. 51). This practice has continued for many years and is still in vogue. The importance of having light colored amber crude is well known in refinery circles (R. 53).

The Valvoline has never served the public in any way. It transports only its own oil for use in its refinery. It operates over its own private rights of way without the right of eminent domain. It has no tariffs or carrying charges, nor has it ever had any demand made upon it to transport oil for others. The Valvoline Pipe Lines is a department of the Valvoline Oil Company. The company was incorporated in New Jersey to continue the operation [fol. 1235] formerly conducted by the partnership. In the charter it is permitted "to engage in any other manufacturing, mining, construction or transportation business" (R. 83). It was never organized as a pipe line company.

The Valvoline lines are practically all two inch and three inch lines not suited for common carrier purposes, nor does it have storage capacity necessary in the transportation business.

The Valvoline has continued in its private capacity to transport its own oil without any supervision by the Interstate Commerce Commission or any State agency. In 1935 the Director of the Bureau of Valuation, in a letter addressed to the Valvoline, directed it to submit certain data and make valuation returns in accordance with Valuation Order No. 26 Revised effective December 31, 1934, the returns to be filed not later than March 7, 1936 (R. 10). The Valvoline refused to comply with the order and filed its petition with the Interstate Commerce Commission denying the right of the Bureau of Valuation to make such demands or that the Valvoline was subject to the provisions of the Act (R. 10).

After a hearing Division I of the Interstate Commerce Commission filed a report February 2, 1937, 47 Val. Rep.

534 (R. 12), holding the Valvoline to be a common carrier subject to the provisions of the Interstate Commerce Act and that it should comply with Valuation Order No. 26. A petition was filed for rehearing (R. 20) based on changed conditions in operations. After further hearing by the entire Commission a report was filed June 6, 1938 (R. 23, 48 Val. Rep. 10), and the Valvoline was again directed to file its data as required by the order. The Valvoline on August 5, 1938, presented a petition to the United States District Court for Western District of Pennsylvania asking for an injunction to restrain the Interstate Commerce Commission from enforcing its Valuation Order. A hearing [fol. 1236] was held before a three judge court specially constituted which was by agreement treated as a final hearing. An opinion by Maris, Circuit Judge (R. 112) filed December 3, 1938, restricting the issue to its narrowest terms, held "that the Valvoline is subject to the provisions of Section 19a of the Interstate Commerce Act authorizing the Commission to value its pipe line property and requiring it to cooperate by furnishing relevant data. That is the only question involved in the case. The case does not involve and we of course do not decide any question as to the extent of the other obligations which may have been imposed upon the Valvoline by the Act." Following this opinion an order was filed January 3, 1939, by the court staying compliance with the decree and valuation order pending final determination of the Appeal to the Supreme Court (R. 124). A petition for appeal to the Supreme Court was filed February 20, 1939, and an order made the same day allowing the appeal (R. 126).

Specification of Errors

The following errors of the District Court are urged herein:

1. In entering the decree dismissing the petition of the plaintiff for a temporary and permanent injunction for want of equity.

2. In holding that the Valvoline Oil Company is a common carrier engaged in interstate transportation of oil by pipe lines within the meaning of the Interstate Commerce Act to the extent that it is subject to the provisions of Section 19a of the Act.

3. In holding that the order of the Interstate Commerce Commission entered June 6, 1938, directing the Valvoline Oil Company to comply with the provisions of the Com-
[fol. 1237] mission's Valuation Order No. 26 was within the Commission's statutory powers and was constitutional.

4. In holding that the petition of the Valvoline Oil Company for an injunction enjoining the enforcement of the order should be dismissed.

5. In holding that the Interstate Commerce Commission had any authority or control over the operations of the Valvoline Oil Company.

6. In refusing to find that the Valvoline Oil Company was a purely private corporation not engaged in any interstate commerce in which the public was interested nor was subject to any regulatory provisions of the Interstate Commerce Act.

7. In failing and refusing to give and accord proper legal force and effect to the evidence of record in this case.

Statutes Involved

This appeal involves an interpretation of the Interstate Commerce Act of February 4, 1887, C. 104 § 1, 24 Stat. 379, as amended by the Hepburn Act of June 29, 1906, C. 3591 § 1, 34 Stat. 584, and Section 400 of the Transportation Act of February 28, 1920, 41 Stat. 474 (49 U. S. C. A. 1).

The pertinent provisions are as follows:

Sec. 1 (1) That the provisions of this chapter shall apply to common carriers engaged in——

Sec. 1 (1) (B) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;——

Sec. 1 (3) The term "common carrier" as used in this chapter shall include all pipe line companies; tele-
[fol. 1238] graph, telephone and cable companies operating by wire or wireless; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid or transmission as aforesaid as common carriers for hire——

Sec. 1 (4) It shall be the duty of every common carrier subject to this chapter—to provide and furnish

such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates, fares and charges applicable thereto and to provide reasonable facilities for operating through routes——.

Sec. 1 (5) All charges made—shall be just and reasonable—and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 1 (6) It is made the duty of all common carriers subject to the provisions of this part to establish, observe and enforce just and reasonable classifications of property for transportation—and just and reasonable regulations and practices.——

Sec. 19a (a) That the Commission shall, as hereinafter provided, investigate, ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of this part——.

Sec. 19a (E) Every common carrier subject to the provisions of this part shall furnish to the Commission or its agents, from time to time and as the Commission may require maps; profiles, contracts, reports of engineers and any other documents, records, and papers; or copies of any or all of the same, in and of such investigation and determination of the value of the property of said common carrier.——

Sec. 19a (i) All final valuations by the Commission and the classification thereof shall be published and [fol. 1239] shall be *prima facie* evidence of the value of the property in all proceedings under this chapter——.

The above quotations are from the Interstate Commerce Act as amended by Section 400 of the Transportation Act of 1920 (41 Stat. 474). The portion of the Hepburn Act of June 29, 1906 (34 Stat. 584), Section One which first included pipe line companies reads as follows:

"That the provisions of this Act shall apply to any corporations or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe

lines, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act."

Argument

Introductory

This appeal involves a consideration of the provisions of the Interstate Commerce Act and its amendments dealing particularly with pipe line companies. It brings again before this Court some questions that were considered in the *Pipe Line Cases*, 234 U. S. 548 (reversing in part 204 Fed. Rep. 798), particularly the *Uncle Sam Oil Company* case.

After the decision in the *Pipe Line Cases*, the Interstate Commerce Commission conducted a pipe line investigation and filed a report known as the "Splawn report." House Report No. 2192, 72nd Congress.

This report contains data of its operations furnished by the Valvoline Oil Company but when the order was made requiring certain pipe line companies to file schedules of rates and charges the Valvoline was not named in the order, although at that time it had extended its lines across the Pennsylvania-West Virginia line (R. 16). It is significant that from that time until the present proceeding no request was made by the Interstate Commerce Commission for data [fol. 1240] or rates, nor was any effort made to bring the Valvoline under the supervision of the Commission or to show that it was affected by the Hepburn Amendment.

The uncontradicted facts developed in the evidence showing the methods used by the Valvoline in its operation are essential to a proper determination of this case. Summarized they are as follows:

The Valvoline and its predecessors have been refiners of crude oil since 1868. To secure an independent source of supply it has for years gathered oil in pipe lines leading to its refineries. First shipments were made from Pennsylvania about 1890 (R. 66) partly by pipe line and partly by rail to Edgewater, New Jersey. Its lines were extended in 1913 to West Virginia, in 1925 to Ohio (R. 44).

The company selects its grade of crude by laboratory tests (R. 51) and rejects oil offered that does not meet requirements (R. 52) even though it has lines through the leases (R. 46).

The Valvoline lays its lines to the producer's tanks and purchases the oil before it is run into the company's lines. The Valvoline operates only in districts served by large common carriers (Exhibit No. 8) and pays the market price or a premium. There is no written contract to purchase. The producer can change connections from the Valvoline to a common carrier line or vice versa within twenty-four hours. No producer is deprived of an outlet for his product (R. 45).

The Valvoline's lines are laid to transport oil directly to its refineries. It stores no oil except at the refineries and has no storage facilities or tank farms along its lines. It has never run any oil that it did not own. It has never sold any oil run — its lines except a small amount of excess oil occasioned by the temporary shut down of the Warren refinery (R. 42). None of the oil sold is now transported across State lines, though for a short time prior to the first [fol. 1241] hearing some oil was gathered in Ohio and sold in West Virginia (R. 20).

The Valvoline gathers its crude oil from about 9020 wells known as "stripper wells" which average 26/100 of a barrel per well per day for a daily run of approximately 2500 barrels. These wells are owned in many small fractional working and royalty interests. The oil carried by the Valvoline is approximately 1% of the total oil run by the common carriers serving the district. The Valvoline operates in a highly competitive field with a constantly diminishing supply of crude oil (R. 48).

The Valvoline has never exercised the right of eminent domain (R. 44). It lays its lines, approximately 1500 miles, on private rights of way (R. 44). It has never transported oil for anyone and no demand or request for transportation service has ever been made upon the company. None of the States in which it operates has undertaken any regulation of its operations or required any permit or franchise (R. 50). No producer is required to sign any agreement or contract for the sale of oil. It is a voluntary arrangement between buyer and seller that can be terminated at any time without notice (R. 45).

If the Valvoline is deemed to be a common carrier it will involve great expense to meet the requirements of the public and the Interstate Commerce Commission (R. 42) and render its own refinery operations much less profitable on account of the various grades and colors of crude oil pro-

duced in the different districts. Valvoline's right to expand, contract and carry on its business as a private refinery enterprise would be impaired and infringed upon if the pipe line department is held to be a common carrier and subjected to all the burdens and restrictions of common carrier operations.

The District Court held that the Valvoline was subject to the provisions of the Act only insofar as it was required [fol. 1242] to comply with Section 19a of Valuation Order No. 26 and that the Act was constitutional as applied to the Valvoline's operations. We contend—

I. That:

(A) The Valvoline is and always has been a purely private enterprise;

(B) That the pipe lines are merely a department or arm in the refining business;

(C) That no "public interest" is involved in the operation;

(D) That the oil transported is not "in commerce" or subject to regulations;

(E) That valuation of properties is the basis for rate making and further regulations;

(F) That the valuation provisions of the Interstate Commerce Act are not severable.

II. That:

(A) The Act as applied to the Valvoline is in violation of the Due Process Clause of the 5th Amendment;

(B) That the change of status is confiscatory;

(C) That its status cannot be changed by legislative fiat.

Argument

I

Can the Valvoline Oil Company be Classified as a Common Carrier Within the Term, Subject to the Provisions of the Interstate Commerce Act?

This question we contend must be answered in the negative when the uncontradicted facts concerning the operations, as shown in the testimony, are fully considered.

[fol. 1243] (a) "Common Carrier" as Defined by the Amendments to the Act

The Hepburn amendment of June 29, 1906 (34 Stat. 584), to the Interstate Commerce Act, the first to include pipe line companies, reads as follows:

> Section 1. "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except natural or artificial gas by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe line and partly by water who shall be considered and held to be common carriers within the meaning and purpose of this act."

The definition of the term "common carrier" in the 1906 Act appears in section one as follows:

> "The term 'common carrier' as used in this act shall include express companies and sleeping car companies. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation operating a railroad whether owned or operated under a contract agreement or lease and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term transportation shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing storage and handling of property transported; and it shall be the duty of [fol. 1244] every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto."

No other definition of a common carrier is given in the Act of 1906. The Commerce Court Act, Section 7 (36 Stat. 544), carries the same definition.

Then came the Transportation Act of 1920 which contained a new definition. Section 1 (3) "The term 'common carrier' as used in this chapter shall include all pipe line companies; telegraph, telephone and cable companies operating by wire or wireless; express companies; sleeping car companies; and all persons, natural or artificial, *engaged in such transportation or transmission as aforesaid as common carriers for hire.* (Italics are added.) Wherever the word 'carriers' is used in this chapter it shall be held to mean 'common carrier'."

The Congressional Record shows no reference in the debates on the Act to the amendment to this definition, nor is any explanation given for the addition of the words "as common carriers for hire."

The explanation comes from the fact that between the Act of 1906 and the Act of 1920 the Supreme Court had occasion to construe the pipe line amendment in the *Pipe Line Cases*, 234 U. S. 548, 34 S. Ct. 956, 58 L. Ed. 1459, affirming 204 Fed. Rep. 798 in part and reversing in part. In those cases, particularly the *Uncle Sam Oil Company* case, the court held that the mere fact that a company carried oil across State lines by pipe line did not make it a common carrier. The Uncle Sam Oil Company owned and operated a refinery in Kansas. It also owned and operated certain wells in Oklahoma and transported oil by pipe line across the State line to its refinery. Whether the Uncle Sam Oil Company transported only oil it produced or whether [fol. 1245] it also purchased oil is not clear. In 204 Fed. Rep. 798-802 we read: "The extent to which this company purchases oil from other producers, if it engages in that business at all does not appear from the record."

The ownership of the oil was not the determining factor for the large carriers all claimed ownership as well. The court held that the Uncle Sam operation was for a definite use in its own refinery, "the transportation being merely an incident to use at the end." Thus the first time the court construes the pipe line Amendment it holds that a company can transport oil by pipe line across State lines and not become a common carrier within the provisions of the Act.

The Valvoline operation differs in one respect—it pro-

duces no oil from its own wells. It purchases its oil from various producers but the transportation is nonetheless incidental to its use in its refineries. Thus is a *bona fide* use established by many years of operation and the ownership is not a mere subterfuge as was found in the other carriers in the *Pipe Line Cases.*

After this decision came the new definition with the qualifying phrase "engaged in such transportation or transmission as aforesaid as common carriers for hire." The words "as aforesaid" refer to the various methods of transportation including pipe lines. The whole history of the pipe line legislation shows that it was to strike at a private monopoly among companies whose primary function was the public transportation by pipe line for profit. The 1920 amendment clarified the definition by excluding private *bona fide* operations that served no public interest. The Valvoline's operations clearly exclude it from the provisions of the act as thus defined.

This line of reasoning was followed in *Tidewater Pipe Line Co.* v. *Crawford Co.*, 143 N. E. 87, 311 Illinois 375 (1924), in which the *Uncle Sam Oil Company* case was cited [fol. 1246] with approval. The Tidewater Company sought to be relieved of local taxation on oil in tanks. This oil was purchased in Crawford County, Illinois, and gathered for shipment to the company's plant in Bayonne, New Jersey. The court made no distinction between oil purchased from producers and oil produced from the company's wells and held that the company in this operation was not a common carrier.

In a Montana case, *Railroad Commissioners* v. *Montana Grant Petroleum Co.*, Docket No. 929, Report and Order No. 1435, Dec. 1, 1925, P. U. R. Digest Vol. 3, sec. 105, page 2727, it was held that a corporation producing a small amount of oil and purchasing larger amounts on term contracts does not by transporting such oil through a pipe line to its refinery act as a common carrier if it does not transport oil for hire and has no monopoly of the field.

(b) Transportation by Pipe Line Merely an Incident to Operation of Valvoline Refineries

The Valvoline early in its history determined that an independent supply of selected crude oil was necessary for

successful and profitable operation of its refineries. It therefore undertook the construction of gathering lines, as distinguished from larger trunk lines, for transportation first in Pennsylvania, later in West Virginia and Ohio. These extensions were necessary to secure oil in a diminishing field. Through all the years the Valvoline maintained a strictly private status. It had no right of eminent domain and assumed none. Its lines were laid direct from the producers to its own refineries and were constructed with no thought of carrying oil for any other person. It has neither lines nor storage adequate to handle or deliver oil for other producers and to make such changes would involve enormous expense. There are large common carriers owning refineries to which they deliver their own oil, but it must be borne in mind that they are primarily carriers [fol. 1247] and the refineries are an adjunct to their transportation systems. The acid test of a company's status is its method of conducting its business over a period of years. The Valvoline's operations meet this test.

Rampone v. *Leonardini* (1936), 1936 Annual P. U. R. 254, 39 Calif., R. C. R. 588;

Public Service Commission v. *Grunshaw*, 49 Wyo. 158, 53 P. (2nd) 1, 109 A. L. R. 534;

James v. *Public Service Commission* (1935), 9 P. U. R. (N. S.) 398, 116 Pa. S. C. 577, 177 Atl. 343;

Brink's Express v. *Public Service Commission*, 117 Pa. S. C. 268, 178 Atl. 346.

(c) Is There Any "Public Interest" Involved in Valvoline's Operations?

The Commission in its report (R. 18) states, "We find that there is a public interest served in the movement of the commodity carried by it."

Practically every private business serves some public interest but this term "public interest" as used in the Commission's report must be limited to the meaning given it in judicial decisions. This term is used almost exclusively in the classification of business known as public utilities. "It means that a business or property in order to be affected with a public interest must be such or be so employed as to justify the conclusion that it has been devoted to a

public use and its use thereby in effect granted to the public." *Williams* v. *Standard Oil Co.*, 278 U. S. 235-239-240, 49 S. Ct. 115.

In *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, Chief Justice Taft speaking for the court subdivides business clothed with a public interest justifying public regulation into three classes; "(1) Those carried on under the authority of a public grant or privileges expressly or impliedly imposing an affirmative duty of ren- [fol. 1248] dering public service demanded by the public such as common carriers and public utilities. (2) Occupations regarded as exceptional, the public interest attaching to which has been recognized from earliest times and has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating trades and callings. In this class are inns, cabs and grist mills. (3) Businesses which, though not public at their inception, have become such by devoting their business to a public use, thereby granting the public an interest in that use and subjecting themselves to public regulations to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly."

The reasoning by the Commission is largely based on the fact that the Valvoline gathers oil from 9020 (Exhibit #10, R. 92) stripper wells scattered over Western Pennsylvania, West Virginia and a small part of Ohio, owned by less than 500 producers or groups (R. 25). That these wells are so small that common carriers cannot afford to construct, maintain and operate lines for transportation of oil in such small quantities. Thus instead of benefitting the producers by having the Valvoline declared a common carrier it would have the opposite effect and tend to destroy the outlet for their oil if the Valvoline had to operate under common carrier regulations. Far from being a monopoly compelling producers to sell their oil, the Valvoline, not fettered by the burdens of common carrier regulations, is able by economical operation to furnish them access to market at prices at least equal to the prices posted by common carriers. Even these operations are in some instances not profitable (R. 64).

The record is void of any fact or circumstance that would indicate public interest in the Valvoline's operation. Gen-

eral welfare does not furnish a sufficient basis for every regulation to which a business might be subjected; nor does the fact that the operation is large and covers considerable [fol. 1249] territory give it any element of public interest. *Tyson Bros.* v. *Banton*, 273 U. S. 418-430.

In the territory served by the Valvoline (Exhibit # 15, Map) the six common carriers transported 79,512.084 barrels of crude and in the same year the Valvoline ran 890,-885 barrels. Where a company transports only a relatively small part of the total production of the field and carries on its business in a private manner it is not a common carrier. *Associated Pipe Lines* v. *Railroad Commission of California*, L. R. A. (N. S.) 1918 C. 849, 169 Pa. 62.

American Jurisprudence Vol. 9, pp. 430-431, cited with approval in 112 A. L. R. 86-90 annotation, states: "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently and hence he is regarded, in some respects, as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out by words or by a course of conduct as to the service offered or performed."

> "The important thing in determining if a corporation is a public utility is what it does, not what its charter says."
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> *Valcour* v. *Morrisville* (Vermont) 27 (New Series) P. U. R. 34-39, 184 Atl. 881.

It was held in *Producers Pipe Line Co.* v. *Martin*, 22 Fed. Sup. 44 (Kentucky), that the public has no right to the use of a pipe line and the owner cannot be compelled to allow any person producing oil to use it where it acquired none of its rights by condemnation, does not hold itself out as a common carrier and uses it only to transport its own oil acquired from many producers.

> "We understand 'public interest' to mean more than mere curiosity. It means something in which the public, the community at large, has some pecuniary in-[fol. 1250] terest or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interests of the particular

localities which may be affected by the matters in question."

State v. *Lyons*, 165 P. 419, 63 Okla. 285; also *State* v. *Crochett*, 206 P. 816, 86 Okla. 124, *New State Ice Co.* v. *Liebmann*, 52 F. (2nd) 349, *Standard Oil* v. *Hall*, 24 F. (2nd) 455, *Overbrook* v. *Public Service Commission*, 100 Pa. S. C. 217.

In a recent case decided by the Superior Court of Pennsylvania, *Weisberger* v. *Pennsylvania Public Utility Commission*, reported in advance sheet 7 A. (2nd) 731, Weisberger operated a dairy and hauled milk purchased from various producers to his dairy and charged the cost of transportation against the price paid for the milk. It was held that the purchaser was his own carrier, the transportation being necessary for the conduct of his own dairy business and was not a common or contract carrier under the statute, citing the *Uncle Sam Oil Company* case as well as *Frost* v. *R. R. Commission*, 271 U. S. 583 and others.

(d) The Oil Transported by the Valvoline Is Not "In Commerce"

The Valvoline requires selected crude for its refinery graded according to color and refining qualities (R. 52). This oil is bought direct from the producer and flows from his tanks to the Valvoline's lines. It is not mixed or commingled with any other oil. Only one grade of oil is transported through these lines. All lines are laid from the producing fields to the refineries. No oil is stored except at the plant which is limited to a ten-day supply. Constant pumping of crude through the lines is essential to the operation of the refinery. This transportation becomes a vital part of the refinery operation. Crude oil is the raw product which is carried to the refinery for manufacture into lubri- [fol. 1251] cating oils, petrolatum and other products. This oil is not "in commerce" until the refining is complete and the products ready for market.

In *Pennsylvania R. R.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170, 56 S. Ct. 687, the Pittsburgh Coal Company transported coal in its own barges down the river and then carried it by rail over private tracks from Pennsylvania to Ohio to its plant to be washed and graded for mar-

ket, "making use of its own facilities, its trains and tugs and barges." This Court sustained the Coal Company's contention that the coal transported by rail across State lines was not "in commerce" until it left the plant where it is prepared for market and was therefore not subject to the regulations of Interstate Commerce. The late Justice Cardozo, speaking for the court, said:

> "Not all commerce is transportation and not all transportation is by common carrier by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between the States. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a Federal Trade Commission. The Interstate Commerce Act (49 U. S. C. A. # 1 *et seq.*) is aimed at common carriers exclusively # 1(1)(3) and not even at all these."
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> In determining the application of the Act, "transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier—And wherever the word carrier is used in this chapter it shall be held to mean 'common carrier'—. *The transportation between Pennsylvania and Ohio was by the owner who was not a common carrier but furnished implements of carriage for its own use exclusively.*" (Italics are added.)
>
> Also *Pennsylvania R. R.* v. *Pitts. Lisbon & W. Ry. Co.*, 83 F. (2d) 861-865.

[fol. 1252] In *Campbell River Mills* v. *Chicago M. & St. P. Ry. Co.*, 53 F. (2d) 69, 52 S. Ct. 310, affirming 42 F. (2d) 775, 283 U. S. 536, 76 L. Ed. 930, logs were hauled over a private logging railroad from British Columbia across the border to U. S. and delivered to defendant railroad for shipment. The logs were not "in commerce" until committ-d to the railroad for shipment. Commerce is a practical legal conception drawn from the course of business, *Savage* v. *Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 Fed. 1182. There is a difference between interstate commerce and interstate transportation. One is governed by the nature of the business; the other by the nature of the particular transportation. "Commerce" is within inhibitions of the

Sherman Act, 15 U. S. C. A. § 1-7, 15, but "transportation" may have no relation to interstate rates on shipment of the same goods within the same State. *Atlantic Coast Line Ry.* v. *Standard Oil Co.*, 12 F. (2d) 541-547, *Youngstown & S. R. R. Co.* v. *Penna. R. R. Co.*, 1935 P. U. R. 64, 7 P. U. C. 530-537.

It is true that the Valvoline sells a very small amount of its oil in crude state. Due to economic conditions the Warren refinery has been shut down since 1932. From 1934 to 1937 a small amount of crude, 3.78% of the total monthly run, was transported from Ohio to West Virginia. A small part of this oil was sold to the refinery at St. Marys, West Virginia (R. 54). This arrangement was a temporary one to dispose of excess crude. None of the crude oil sold has crossed state lines since 1937 (R. 54). It was sold to two small refineries close to the Valvoline lines as an accommodation to the Valvoline and at its request (R. 64). The amount of excess oil is diminishing and will soon adjust itself. This sale of excess oil as a temporary measure does not change the status of the company, *Valcour* v. *Morrisville, supra.*

[fol. 1253] (e) Purpose of Requirement Under the Act for Valuation of Properties

Under Sec. 19a(a) of the Act the Commission was directed to value the properties belonging to or used by common carriers. The purpose of this provision for valuation is to have adequate data to determine the justness of the rates charged by the carriers. The order for Valuation No. 2[illegible] served on the Valvoline is the first step in compelling it as a common carrier to submit data, establish traffics and rates, and in general to comply with all regulations affecting common carriers. It was argued by government counsel that this Valuation Order was no hardship on the Valvoline and could be easily complied with. In the first place, it would be very difficult for the Valvoline to furnish the necessary data. Its lines were laid over a period of fifty years without any definite plan in mind (R. 69). No adequate records were kept of location of lines, rights of way and other data (R. 70), and it would require a large amount of work to satisfy the Interstate Commerce Commission.

In the second place it definitely fixes the status of the

Valvoline as a common carrier, for the primary use of valuations under the Act is for rate making purposes.

N. Y., N. H. & H. R. Co. v. *I. C. C.*, 55 F. (2d) 1028-1034, 287 U. S. 178-200, 53 S. Ct. 106, 77 L. Ed. 248; and the Act makes the valuation mandatory for all common carriers with a few minor exceptions that have no application here.

(f) Valuation—The Provisions of the Act Are Not Severable

This case was submitted to the District Court on the record before the Interstate Commerce Commission. No additional testimony was taken. The Valvoline questioned the authority of the Interstate Commerce Commission to compel it to comply with Valuation Order No. 26. In de-[fol. 1254] ciding this case the District Court undertook to sever the provisions of the Act and restrict the decision to compliance with the Valuation Order. The Court said: "We therefore decide that the Valvoline is subject to the provisions of Section 19a of the Interstate Commerce Act authorizing the Commission to value its pipe line property and requiring it to cooperate by furnishing relevant data. That is the only question involved in the case. The case does not involve, and we of course do not decide, any question as to the extent of the other obligations which may have been imposed upon the Valvoline by the Act" (R. 119). The court must have given heed to this statement in the brief of defendant, "The Commission's order under attack requires nothing more of the petitioner than the furnishing of certain information." These honeyed words are only sugar coating for the bitter pill. The decision requiring data for valuation is based on the finding of the Commission that the Valvoline is a common carrier. The District Court now limits its decision thus (R. 119-120):

> "The Valvoline Oil Company is a common carrier engaged in the interstate transportation of oil by pipe line within the meaning of the Interstate Commerce Act *to the extent* that it is subject to the provisions of Section 19a of the Act." (Italics are added.)

Does the court undertake to create a new class of common carriers subject only to certain provisions of the act or does this statement show that the District Court could not go the whole way and declare the Valvoline a common

carrier in all respects? The Valvoline has no reason to refuse to supply any information it has or that it can reasonably secure for the Commission, nor does it complain of the order to avoid taxation because it now pays the tax levied on oil transported by pipe line (R. 50). The Valvoline's complaint is that classed as a common carrier it is [fol. 1255] forced to supply this data and that it will be subject to all other regulations of the Commission applicable to common carriers in general. The three judge court with its own knowledge of the oil business and its operations in the Pennsylvania field refused to say that the Valvoline was a common carrier for all purposes under the Act. We contend the court fell in error in trying to sever the provisions of the Act. If the facts developed in the testimony do not warrant the finding that the Valvoline is a common carrier for all purposes, then it was the court's duty to restrain the Interstate Commerce Commission from issuing any order based on such a finding.

The Interstate Commerce Commission seemed also to entertain some doubt as to the application of this Act to the Valvoline. After concluding that the Act intended to convert all interstate pipe lines to common carriers without regard to their previous status the report says (R. 15):

> "Whether Congress could lawfully so act is not for us to decide. The Interstate Commerce Commission is an administrative body which may not presume to annul by interpretation an act of the federal legislature. As the result of our investigation certain pipe line companies, parties to the proceeding, were ordered to file schedules of rates and charges for the interstate transportation of oil in compliance with the provisions of the Act. *The Valvoline was not named in our order although its lines at that time extended across the Pennsylvania West Virginia State line.*" (Italics are added.)

The investigation referred to was summarized in a "Report on Pipe Lines," House Report No. 2192, 72nd Congress, prepared by Mr. Walter M. W. Splawn.

The failure to include the Valvoline in the list of common carriers is strong indication that at that time the Interstate Commerce Commission concluded, after investigation, that the Valvoline was not a common carrier. There are no [fol. 1256] facts or circumstances regarding the company's

operations in the intervening years to change the situation. It is interesting to note that during the hearing before the Interstate Commerce Commission Mr. Eastman asked counsel for the Commission what benefit was to be had from the valuation of the Valvoline as it was now paying the pipe line tax. Counsel responded that there was no apparent benefit to be derived but that the act was mandatory. Why, then, should we strain the construction of the act to bring the Valvoline within its provisions without benefit to the public and to the great detriment of the company, forcing it into the common carrier class.

II

Are These Provisions of the Interstate Commerce Act as Applied to the Valvoline in Violation of the Constitution?

(a) Interstate Operations of Valvoline Before Hepburn Amendment

Stress has been laid on the fact that Valvoline did not lay any pipe lines across state lines until 1913 (R. 44). This is true but it is also true that Valvoline has been engaged in interstate transportation for over fifty years. These shipments came under the classification in the amendment of shipments "partly by pipe line and partly by rail." The Valvoline's first pipe lines were laid near Warren, Pennsylvania, about 1890 or before (R. 66). A large part of this oil was piped to a loading rack at Tiona, Pennsylvania, and shipped from there by rail to the company's refinery at Edgewater, New Jersey (R. 66). This method of interstate shipments was well established and in operation long before the Hepburn amendment of 1906.

[fol. 1257] ### (b) Confiscation of Property by Change of Status

To change the private status of the Valvoline to that of a common carrier under the Act will involve expenses of operation and equipment estimated from $200,000 to $300,000 (R. 42). This does not include the additional cost of any increase in lines or storage if other oils not up to Valvoline specifications, known as "pipe line crude" are carried for the public (R. 43). To meet the demands of a public carrier requires a complete change not only in the equip-

ment for pumping oil through the lines but also the erection of storage tanks and a rearrangement of the method of handling crude at the refineries. Thus the conversion of a private operation to public use becomes a taking without "Due Process." *Adair* v. *U. S.*, 208 U. S. 161.

The recent proposed legislation for the divorcement of pipe lines from refineries (Senate Bill No. 2009 on which the Senate Interstate Commerce Committee held hearings, and the Borah Gillette Bill S. 2181 introduced April 17, 1939) serves as an illustration of what may be expected if the Valvoline is held to be a common carrier. A separation of the Valvoline's pipe lines from the refinery operation would render the pipe lines unprofitable and practically valueless. Like the Hepburn amendment aimed at monopolistic operations of the large carriers, this new legislation is aimed to cure some similar evils. The Valvoline's operation is so small it is almost negligible. It has no means or method to compel any producer to deal with it. Any reason for divorcement of large carriers and refineries is entirely lacking in the Valvoline operation, yet such legislation might apply to it if the Valvoline is determined to be a common carrier for all purposes.

[fol. 1258] (c) The Status of the Valvoline Cannot be Made by Legislative Fiat

We have undertaken to show that the Valvoline's operation was interstate before the Hepburn amendment of 1906. Thus a purely private interstate pipe line operation would by legislative fiat be stripped of its private character and declared to be a common carrier. With the resultant expense to operate as a common carrier and the damage sustained it becomes an appropriation of private property without compensation and without due process of law.

In the *Pipe Line Cases, supra*, Chief Justice White in a concurring opinion stated that there was no power under the Constitution without the exercise of the right of eminent domain to convert a private business into a public one without the company's consent.

In *Producers Transport Co.* v. *R. R. Commission of California*, 251 U. S. 228, affirming 176 Calif. 499, Mr. Justice Van Devanter said:

> "It is of course true that if the pipe line was constructed solely to carry oil for particular producers

> under strictly private contracts and never was devoted by its owner to public use, that is to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation which no state can do consistently with the 'due process of law clause' of the 14th Amendment."

In another California case, *Associated Pipe Line Co.* v. *Railroad Commission*, L. R. A., U. S. 1918C 849, 169 Pac. 62, the statute was held in violation of the due process clause of the 14th Amendment where it undertook to convert a private pipe line into a common carrier. The company in [fol. 1259] question had never exercised the right of eminent domain nor transported oil for hire. It was held that the use by the owner determined its status and that to declare such a company a common carrier was to deprive it of its rights and to dedicate it to public use without due compensation.

A private carrier cannot by mere legislative command be converted against its will into a common carrier. *Frost* v. *R. R. Commission*, 47 A. L. R. 457, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605; *Dairymen's Cooperative Assn.* v. *Public Service Co.*, 115 Pa. S. C. 100-112, 318 Pa. 381, 177 Atl. 770; *State Ex. Rel. Fulton* v. *Ives*, 123 Florida 401, 167 Southern 394.

In *Smithennan & McDonald Inc.* v. *Mansfield Hardwood Lumber Co.*, 6 F. (2d) 29, construing an Arkansas statute the court said:

> "The latter (the statute) of course is limited to common carriers and does not extend to transportation for the sole purpose of conducting material to and from its own mill."

Here we have a company that embarked long ago in a purely private business and has never changed its policy. Its investments were made long before pipe lines became the subject of interstate commerce regulation. As proof that the Valvoline does not deny the governments exercise of lawful authority over pipe lines it should be noted that the Valvoline pays a tax (R. 50) imposed upon "all transportation of crude petroleum and liquid products thereof by pipe line". Revenue Act of 1932, Sec. 731(a), 47 Stat.

275, and the prior Revenue Act of 1918, Sec. 50(d), 40 Stat. 1103, upon all tranportation of oil by pipe line.

The Act further provides (A-2)—"In case no charge for transportation is made either by reason of ownership of the commodity transported or for any other reason, a tax equivalent to 4 per centum of the fair charge for such trans-[fol. 1260]portation, to be paid by the person furnishing the transportation;" (B-2) "If no such rates or tariffs exist then at the basis of actual *bona fide* rates or tariffs of other pipe lines for like service". These sweeping provisions affect private carriers and common carriers alike.

Conclusion

The issue here is clearly defined. The order of the Commission and its authority to make the order are based upon the finding that the Valvoline is a common carrier. While such a finding presumably might not at present interfere with the company's operation it cannot be predicted, as shown by the pending legislation on divorcement of pipe lines, in what manner or how seriously the Valvoline may be involved. The Valvoline's operation has not in all the years of operation transgressed any rights of others nor has there ever been any complaint about its operations. These facts only sustain our contention that its purchase and piping of oil is a private transaction between buyer and seller in which the public has no interest.

We, therefore, respectfully submit that this finding of the Commission and the District Court should be set aside and a permanent injunction granted.

Harry S. Elkins, J. Campbell Brandon, Attorneys for Valvoline Oil Company, Appellant.

[fol. 1260-a] In the United States District Court for the Western District of Oklahoma

Clerk's Certificate

I, Theodore M. Filson, Clerk of the United States District Court for the Western District of Oklahoma, do hereby certify that the attached and foregoing are the Petitioner's original exhibits "C", "D", "F", "G" and Number X, as called for in the plaintiff's praecipe for record, and as included in order of this Court directing the Clerk to transmit

the original of such exhibits to the Supreme Court of the United States, in Case No. 1559-Civil, Champlin Refining Company, Petitioner vs. United States of America, et al., Respondents.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Oklahoma City, in said District this 8th day of May, A. D. 1945.

Theodore M. Filson, Clerk, by Margaret P. Blair, Deputy. (Seal.)

[fol. 1261] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY APPELLANT—Filed May 18, 1945

The Champlin Refining Company, Appellant, will rely upon the following points in brief and oral argument before this Court on its appeal in the above entitled cause:

I

The Champlin Refining Company in the operations of its products pipe line is not a common carrier under the terms and provisions of the Interstate Commerce Act and its amendments.

[fol. 1262]

II

It has never engaged in transportation of petroleum products for hire in interstate commerce.

III

The Interstate Commerce Commission is without authority in law to direct the Champlin Refining Company's compliance with its Orders No. 26 (Exhibit 45) and No. 27 (Exhibit 46) with relation to the Champlin products pipe line, the operation of which is the subject of this litigation.

IV

The Champlin Refining Company is a private corporation only, and has never acted as; nor held itself out to be, nor has it ever been requested to become, a common carrier, or to perform any public service.

V

There is no evidence to support the order of the Interstate Commerce Commission or the approval thereof by the majority of the trial court.

VI

The provisions of the Interstate Commerce Act as construed and applied to the operations of Appellant's products [fol. 1263] pipe line, by the majority of the trial court, are unconstitutional and in derogation and violation of the guaranties of the Fifth Amendment to the Constitution of the United States.

VII

Appellant contends, however, that the question of unconstitutionality does not properly present itself for the reason that the provisions of the Interstate Commerce Act do not apply to the operations of Appellant's products pipe line.

VIII

The majority of the trial court erred as a matter of law in construing the Interstate Commerce Act to apply to and bring within the jurisdiction of the Interstate Commerce Commission the operations of Appellant's products pipe line.

IX

The majority of the trial court erred as a matter of law in failing and refusing to extend to Appellant the benefit of the rule of exception granted the *Uncle Sam Oil Company* in the *Pipe Line cases*, 234 U. S. 548, the principle of which exception is determinative of the question here.

[fol. 1264]

X

The majority of the trial court also erred as a matter of law in failing and refusing to extend to Appellant the benefit of the rule announced in *Pennsylvania Ry. Co.* v. *Public Utilities Commission*, 298 U. S. 170, the principle of which decision is further determinative of the question here.

XI

The majority of the trial court also erred as a matter of law in failing and refusing to extend to Appellant the bene

fit of the rule announced in *Producers Transportation Co. v. Railroad Commission of the State of California*, 251 U. S. 228, the principle of which decision is further determinative of the question here.

XII

The Appellant's petition for rehearing in the trial court should have been granted and allowed.

XIII

Appellant should have been granted injunctive relief as prayed in its amended petition.

[fol. 1265] XIV

The final decree entered by the majority of the trial court is unsupported in fact and void as a matter of law, and should be vacated and set aside by this Court.

Harry O. Glasser, Dan Moody, Counsel for Appellant.

Service upon each Appellee of a copy of the foregoing Statement of Points Relied Upon is hereby acknowledged.

Dated at Washington, D. C., this 18 day of May, 1945.

Hugh B. Cox (A. Q.), Acting Solicitor General;
Nelson Thomas, Counsel for Interstate Commerce Commission.

[fol. 1266] [File endorsement omitted.]

[fol. 1267] SUPREME COURT OF THE UNITED STATES

APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED —Filed May 17, 1945

Appellant designates the entire record which has been transmitted by the Clerk of the District Court of the United States for the Western District of Oklahoma to be printed for the consideration of the points relied upon by Appellant, with the following exceptions which shall not be printed, except such portions thereof as may be specifically identified for printing.

(1) Omit in printing Exhibits "B," "D," "E" and "F" to petition filed in lower court, pp. 53-112, inc., same having been designated for printing elsewhere in the record.

(2) Order for associate judges, p. 113.

(3) Application for authority to transmit originals of certain exhibits, p. 304.

(4) Appeal bond, p. 337.

(5) Omit transcript of proceedings of October 12, 1944, pp. 360-503, inc. Except print the whole of pp. 413-423, inc. and p. 447, the first 9 lines of p. 448, and commencing with line 4 all of the balance of p. 452, the whole of pp. 453, 454, 455, 456 and 457 to line 14, inc.

[fol. 1268] (6) Exhibit 16, being a certified copy of Articles of Incorporation (and related papers) of the Champlin Refining Company, except that part of page 844 thereof identified as **3,, which recites the purposes of organization of the Champlin Refining Company, which portion of such page shall be printed, pp. 843-881, inc.

(7) Exhibit 17, being a certified copy of Articles of Incorporation (and related papers) of Cimarron Valley Pipe Line Company, pp. 882-885, inc.

(8) Exhibit 18, being a certified copy of Amended Articles of Incorporation (and related papers) of Cimarron Valley Pipe Line Company, except that part of page 887 thereof identified as **3., which recites the purposes of organization of the Cimarron Valley Pipe Line Company, which portion of such page shall be printed, pp. 886-889, inc.

(9) Exhibit 19. Appointment of service agent in Oklahoma by Cimarron Valley Pipe Line Company, p. 890.

(10) Exhibit 20. Increase in capital stock of Cimarron Valley Pipe Line Company, p. 891.

(11) Exhibit 21. Authorization of Cimarron Valley Pipe Line Company to do business in Kansas, p. 892.

(12) Exhibit 22. Appointment of resident agent in Nebraska by Cimarron Valley Pipe Line Company, pp. 893-894, inc.

(13) Exhibit 23. Qualification by Cimarron Valley Pipe Line Company to do business in Nebraska, p. 895.

(14) Exhibit 26. Form of application used by Cimarron Valley Pipe Line Company and filed with certain boards

of county commissioners when pipe line was being planned and constructed, pp. 901-903, inc.

(15) Exhibit 27. Form of orders issued upon applications covered by Exhibit 26, pp. 904-906, inc.

(16) Exhibit 31. Form of application for authority to construct pipe line over certain highways in certain named counties in Nebraska, pp. 918-920, inc.

[fol. 1269] (17) Exhibit 32. Forms of orders issued in certain counties named therein, setting forth conditions assumed by Appellant in crossing certain counties, pp. 921-923, inc.

(18) Exhibit 38. A letter addressed to, and permit received from, the War Department, pp. 947-950, inc.

(19) Exhibit 41. Except first three pages thereof, to-wit, pages 957, 958 and 959, which are to be printed. Application filed with Iowa Commerce Commission (and related papers) for authority to maintain and operate pipe line through certain counties, pp. 957-979, inc.

(20) Exhibit 42. Permanent permit and related papers for Rock Rapids lateral pipe line, pp. 980-899, inc.

(21) Exhibit 43. Letter of October 7, 1941, p. 989.

(22) Exhibit 44. Copy of permanent permit No. 157 issued by the State of Iowa Commerce Commission with related papers, pp. 990-999, inc.

(23) Exhibit 47. Letter of G. E. Leverton, and related papers, pp. 1040-1043, inc.

(24) Exhibit 48. Letter of G. E. Leverton, and related papers, pp. 1044-1059, inc.

(25) Order extending effective date of order for compliance, Sept. 2, 1944, p. 1082.

(26) Exhibit "X" being original refused report tendered Interstate Commerce Commission by Appellant.

Appellant agrees that Appellees may file in this Court, to be printed as a part of the record, copies of their proposed findings of fact and conclusions of law which were submitted to the trial court and inadvertently omitted in the transcript transmitted to this Court, and that the whole of the transcript which has been transmitted to this Court,

shall be retained as a part of the record in this case, and [fol. 1270] may be referred to by the Supreme Court, and by counsel for either party in their briefs and oral argument.

Dated at Washington, D. C. this 16th day of May, 1945.

Harry O. Glasser, Dan Moody, Counsel for Appellants.

Service upon each Appellee of a copy of the foregoing Designation of Record is hereby acknowledged.

Dated at Washington, D. C., this 16th day of May, 1945.

Hugh B. Cox (A. Q.), Acting Solicitor General; Nelson Thomas, Counsel for Interstate Commerce Commission.

[fol. 1271] [File endorsement omitted.]

[fol. 1272] IN THE SUPREME COURT OF THE UNITED STATES

APPELLEES' AMENDED DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED—Filed June 28, 1945

In lieu of their designation of additional parts of record to be printed, dated May 26, 1945, and heretofore filed in the above-styled cause, appellees hereby designate for printing the following parts of the record transmitted by the Clerk of the District Court of the United States for the District of Oklahoma to the Clerk of the Supreme Court of the United States, in addition to those parts heretofore designated by appellant under date of May 16, 1945:

1. In lieu of printing in full Exhibit B to the petition filed in the District Court, being Valuation Order No. 26 revised, of the Interstate Commerce Commission, effective December 31, 1934 (appearing at pages 53-54 of the record), insert an appropriate reference to the place where said order is printed in full elsewhere.

2. Appendix A to Exhibit E to petition in the District Court, being the report of Division 2 of the Interstate Commerce Commission in Valuation Docket No. 1267, dated December 14, 1942 (appearing at pages 77-88 of the record, prints thereof to be furnished by appellant).

3. Appendices A and B to Exhibit F to petition in the District Court, being the report and order of the Interstate Commerce Commission on reargument in Valuation. [fol. 1273] Docket No. 1267, dated June 12, 1944 (appearing at pages 100-111 of the record, prints thereof to be furnished by appellant).

4. Order convening three judge court (appearing at page 113 of the record).

5. In connection with the petition for rehearing and Exhibits A, B and E thereto, which appear, respectively, at pages 146, 167, 227 and 291 of the record, Exhibits C, D, F and G thereto should be printed in proper alphabetical order, these latter exhibits not having been designated by page numbers in the transcript of record as transmitted, and consisting, respectively, of the briefs of the United States and the Interstate Commerce Commission in the *Pipe Line Cases*, and the briefs for the United States and the Valvoline Company in the *Valvoline Case*.

6. Application for authority to transmit originals of certain exhibits (appearing on page 304 of the record).

7. From line 13 of page 361 to and including line 3 of page 362 of the transcript, and pages 447 to 452, inclusive, of the transcript of proceedings of October 12, 1944.

8. In connection with Exhibit 15 of the proceedings before the Interstate Commerce Commission, print the alphabetically numbered exhibits from A through T, both inclusive (at pages 799-842, inclusive, of the record).

9. Exhibit 21, Cimarron Company's authority to operate in Kansas (at page 892 of the record).

10. Exhibit 23, qualification by Cimarron Company to do business in Nebraska (at page 895 of the record).

11. Exhibit 26, forms of application used by Cimarron Company filed with county commissioners and boards (pages 901 to 903, inclusive, of the record).

12. Exhibit 27, form of orders issued upon applications upon forms set out in Exhibit 26, supra (pages 904-906, inclusive, of the record).

[fol. 1274] 13. Exhibit 31, form of application for authority to construct pipe line over certain highways in Nebraska (pages 918-920, inclusive, of the record).

14. Exhibit 32, forms of orders issued in certain counties relative to conditions assumed by appellant (pages 921-923, inclusive, of the record).

15. Exhibit 38, letter addressed to and permit received from War Department relative to Missouri River crossings (pages 947-950, inclusive, of the record).

16. Exhibit 42, permanent permit and related papers for Rock Rapid lateral pipe line (pages 980-988, inclusive, of the record), omitting description of property beginning line 11 of page 981, continuing to and including line 17 of page 987.

17. Exhibit 43, letter of October 7, 1941 (page 989 of the record).

18. Exhibit 44, permanent permit No. 157, issued by Iowa Commerce Commission (pages 990-999, inclusive, of the record), omitting the part thereof beginning line 12, on page 992, and ending with line 37 on page 998.

19. Exhibit 47, letter of G. E. Leverton and related papers (pages 1040-1043, inclusive, of the record).

20. Findings of fact and conclusions of law requested by defendants received as part of the record herein, under additional certificate.

21. Portion of transcript of proceedings in District Court, April 13, 1945, received as part of record herein, under additional certificate, on June 11, 1945.

This 27th day of June, 1945.

Charles Fahy, Solicitor General; Wendell Berge, [fol. 1275] Assistant Attorney General; Edward Dumbauld, Special Assistant to the Attorney General; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Nelson Thomas, Attorney, Interstate Commerce Commission.

I certify that copies of the foregoing designation were this day mailed to the following persons: Harry O. Glasser, Esq., Attorney at law, Enid, Oklahoma; Dan Moody, Esq., Norwood Building, Austin, Texas.

This 27th day of May, 1945.

Edward Dumbauld, Special Assistant to the Attorney General.

[fol. 1276] [File endorsement omitted.]

[fol. 1277] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 18, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Roberts took no part in the consideration of this question.

[fol. 1277a] [Endorsed on Cover:] File No. 49722. Western Oklahoma. D. C. U. S. Term No. 75. Champlin Refining Company, Appellant, vs. The United States of America, and Interstate Commerce Commission. Filed May 14, 1945. Term No. 75 O. T. 1945.

ADDITION TO TRANSCRIPT

[fol. 966] UNITED STATES SUPREME COURT

No. ——

CHAMPLIN REFINING COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Appellees

Appeal from the United States District Court for the Western District of Oklahoma

[fol. 967] H. B. 59-80-213.

DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

October 11, 1941

Valvoline Pipe Lines
P. O. Box 911
Butler, Pennsylvania

DEAR SIR:

I have your letter of October 7, 1941, showing that all recent movements of crude oil over your crude oil pipe line, from points in West Virginia to points in Pennsylvania, have been oil which you purchased from others.

In *Valvoline Oil Company* v. *United States*, 308 U. S. 141 (decided November 1939), your pipe line was held to be a common carrier under Section 1 of the Interstate Commerce Act and you were required to comply with the Valuation Order of the Commission.

Please advise me whether you have filed schedules of rates with the Interstate Commerce Commission in compliance with Section 6 (1) and (7) of the Interstate Commerce Act, and Section 1 of the Elkins Act. If not, do you care to state the reasons, if any, why such schedules have not been filed?

Yours very truly, Thurman Arnold, Assistant Attorney General.

Phone information to Vogale 10/14/41 who suggests follow Brandon's advice. J. J. D. 10/14/41.

[fol. 968] CLERK'S CERTIFICATE TO ADDITION TO TRANSCRIPT

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Theodore M. Filson, Clerk of the United States District Court for the Western District of Oklahoma, do hereby certify the above and foregoing to be a photo copy of "Plaintiff's Exhibit 1," being an original letter which was permitted to be identified and offered, but not received in evidence in the trial of Case No. 1559-Civil, Champlin Refining Company, Petitioner vs. United States of America, Defendant, as shown by the transcript of the record as printed in the Supreme Court of the United States, No. 75 October Term 1945, pp. 131 and 132, which said exhibit is hereby certified to be a true, complete and correct copy of the original thereof, as an addition to the Transcript of Record on Appeal to the United States Supreme Court, which exhibit was inadvertantly omitted by this office, from the original transcript; said exhibit being now transmitted at the request of counsel for the Champlin Refining Company.

That by the order of the trial court (R. No. 75 October Term 1945, p. 133) the appellant was permitted to withdraw the original letter offered in evidence and substitute photo copy in lieu of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Oklahoma City, in said District, this 15 day of March 1946, A. D.

Theodore M. Filson, Clerk, By Margaret P. Blair, Deputy. (Seal.)